Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

ALEXANDRE ARONOV, PETITIONER

v.

JANET NAPOLITANO,
SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 8 U.S.C. 1447(b), an applicant for naturalization may bring suit in federal district court to compel a determination on his application if United States Citizenship and Immigration Services (USCIS) fails to make a determination within 120 days of the applicant's examination. The question presented is as follows:

Whether an applicant for naturalization who brings suit under 8 U.S.C. 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is entitled to attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A).

PARTIES TO THE PROCEEDING

Petitioner is Alexandre Aronov. Respondents are Janet Napolitano, Secretary of Homeland Security; Alejandro Mayorkas, Director, United States Citizenship and Immigration Services; Denis Riordan, District Director, United States Citizenship and Immigration Services; and Robert S. Mueller, III, Director, Federal Bureau of Investigation.

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PETITION FOR A WRIT OF CERTIORARI

Alexandre Aronov respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-59a) is reported at 562 F.3d 84. The opinion of the court of appeals panel (App., *infra*, 60a-107a) is reported at 536 F.3d 30. The district court's order granting petitioner's motion for attorney's fees and costs (App., *infra*, 108a-114a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2009. On July 7, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In relevant part, the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), provides:

> [A] court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

After United States Citizenship and Immigration Services (USCIS) failed to act in a timely manner on his application for naturalization, petitioner brought suit against respondents in the United States District Court for the District of Massachusetts, asking the court either to adjudicate his application or to order USCIS to do so. The district court remanded the case to USCIS so that it could grant his application for naturalization by a specified date. The court then granted petitioner's motion for attorney's fees and costs under the Equal Access to Justice Act (EAJA). App., *infra*, 108a-114a. A panel of the court of appeals initially affirmed the fee award. *Id.* at 60a-107a. After granting rehearing en banc, however, the court of appeals reversed. *Id.* at 1a-59a.

1. Naturalization is the process by which a person not born in the United States becomes an American citizen. In order to be naturalized, an individual must submit an application to USCIS (formerly the Immigration and Naturalization Service (INS)). 8 U.S.C. 1445; 8 C.F.R. Pt. 334. The applicant must first undergo a background investigation. 8 U.S.C. 1446(a); 8 C.F.R. 335.1. The applicant must then undergo an in-person examination conducted by a USCIS officer. 8 U.S.C. 1446(b); 8 C.F.R. 335.2. USCIS may not ask the applicant to appear for the examination until it has received "a definitive response" from the Federal Bureau of Investigation (FBI) that a "full criminal background check" has been completed. 8 C.F.R. 335.2(b).

USCIS must determine whether to grant or deny the application either at the time of the examination itself or within 120 days of the examination. 8 U.S.C. 1446(d); 8 C.F.R. 335.3(a). Critically for present purposes, if USCIS fails to make a determination within the 120-day period, the applicant "may apply to the United States district court for the district in which the applicant resides for a hearing on the matter." 8 U.S.C. 1447(b). That court may either "determine the matter" or "remand the matter, with appropriate instructions, to [USCIS] to determine the matter." *Ibid.*

As has been widely reported, the naturalization process has been wracked with delays in recent years, in part because of problems in conducting background investigations. See, *e.g.*, Julia Preston, *Federal Suit Is Seeking To Expedite Citizenship*, N.Y. Times, Dec. 5, 2007, at A28 (noting that "[b]acklogs of F.B.I. background checks from past naturalization petitions are dogging the Citizenship and Immigration Services agency"); Julia Preston, *Surge Brings New Immigration Backlog*, N.Y. Times, Nov. 23, 2007, at A26 (noting that

"backlogs * * * have burdened the United States immigration system for years" and that "[t]he deluge has been so great that the agency is struggling to send out notices acknowledging it has received * * * applications [for naturalization]").

2. Petitioner is a native of Russia who married an American citizen and subsequently became a permanent resident of the United States. On May 22, 2004, petitioner submitted an application for naturalization to USCIS. On February 14, 2005, a USCIS officer examined petitioner concerning his application. Contrary to the applicable regulatory requirements, however, USCIS had not yet completed its background investigation. Despite numerous inquiries, petitioner heard nothing from USCIS for more than a year following his examination. On March 23, 2006, petitioner received a letter from USCIS indicating that his application was still being processed. App., *infra*, 4a-5a, 33a-34a, 108a-109a.

On August 28, 2006—more than eighteen months after his examination—petitioner brought suit against respondents in the United States District Court for the District of Massachusetts. C.A. App. 54-62. As is relevant here, petitioner sought relief under 8 U.S.C. 1447(b) on the ground that USCIS had failed to make a determination on his naturalization application within 120 days of his examination. C.A. App. 55-56. Accordingly, petitioner asked the court either to adjudicate his application or to order USCIS to do so. *Id.* at 57.

At the time of petitioner's lawsuit, USCIS had a written policy of expediting background investigations for those applicants who sued the agency to challenge delays in processing their naturalization applications. See C.A. App. 45. Consistent with that policy, after petitioner brought suit, USCIS promptly completed its background investigation and determined that his application should

be granted. On October 6, 2006, the parties filed a joint motion to remand the case to USCIS "so that it c[ould] grant [petitioner's] application for naturalization and schedule [petitioner] for an oath ceremony for no later than November 8, 2006." *Id.* at 52. On October 12, the district court granted the motion in a summary order. See *id.* at 50. On November 8, petitioner was sworn in as an American citizen. See App., *infra*, 2a, 109a.

Petitioner then filed a motion for attorney's fees and costs under EAJA. In order to obtain fees under EAJA, a movant must show that he was a "prevailing party"; if he does so, the burden shifts to the government to show that fees should not be awarded because its position was "substantially justified." 28 U.S.C. 2412(d)(1)(A).

The district court granted petitioner's motion. App., *infra*, 108a-114a. The district court first determined that, for purposes of EAJA, petitioner was a "prevailing party." *Id.* at 110a-111a. The district court explained that, in order to qualify as a prevailing party under this Court's decision in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), a plaintiff must show that there was "judicial imprimatur" on a material change in the legal relationship between the parties. App., *infra*, 110a. The district court concluded that the "judicial imprimatur" requirement was met because, in its earlier order, it had "remanded specifically so that USCIS c[ould] grant [petitioner's] application for naturalization, and schedule [petitioner's] oath ceremony for no later than November 8, 2006." *Id.* at 110a-111a (internal quotation marks and citation omitted). The court reasoned that "the government here was granted not a dismissal, but a remand to the agency *conditional on* the granting of [petitioner's] naturalization action by November 8, 2006." *Id.* at 111a. "Had the naturalization not so oc-

curred," the court continued, "the parties might very well be back in front of this Court litigating a contempt action." *Ibid.*

The district court then determined that, for purposes of EAJA, the government's position was not "substantially justified." App., *infra*, 111a-113a. The court explained that, in this case, "the bottom line is that the government unjustifiably delayed [petitioner's] naturalization [processing], forcing him to file a [Section 1447(b)] action at personal expense; indeed, the government's internal expedite procedures formally establish this as one way for applications to be 'expedited' (or rather, completed on time)." *Id.* at 113a. The court concluded that "[i]t is not 'substantially justified' for the government to force naturalization applicants to incur additional expense—and the courts to be burdened—just to have naturalization applications processed in the timely manner already supposedly guaranteed by statute (or, more correctly, to slightly mitigate the already unlawful delay in that processing)." *Ibid.*

The district court awarded petitioner attorney's fees and costs in the amount of $4,270.94, based on a total of 22½ hours of attorney time. App., *infra*, 114a; C.A. App. 22.

3. The government appealed the fee award, and a divided panel of the court of appeals initially affirmed. App., *infra*, 60a-107a. After granting the government's petition for rehearing en banc, however, the court of appeals reversed by a 3-2 vote. *Id.* at 1a-59a.

a. The en banc court of appeals first held that, for purposes of EAJA, petitioner was not a prevailing party. App., *infra*, 8a-18a. At the outset, the court of appeals agreed with the district court that, under *Buckhannon*, the appropriate inquiry was whether there was "judicial imprimatur" on a material change in the legal relation-

ship between the parties. *Id.* at 9a. According to the court of appeals, "*Buckhannon* explicitly identified two and only two situations which meet the judicial imprimatur requirement: where plaintiff has received a judgment on the merits * * * or obtained a court-ordered consent decree." *Id.* at 9a-10a (internal quotation marks and citation omitted).

The court of appeals observed that "[t]he order here was plainly not a judgment on the merits, nor was it labeled a court-ordered consent decree." App., *infra*, 10a (internal quotation marks omitted). The court conceded that, for a court order to qualify as a "court-ordered consent decree," "the formal label of 'consent decree' need not be attached; it is the reality, not the nomenclature which is at issue." *Id.* at 10a-11a. But the court asserted that, for an order to qualify as the equivalent of a consent decree for purposes of *Buckhannon*, "the change in legal relationship must be court-ordered"; "there must be judicial approval of the relief vis-à-vis the merits of the case"; and "there must be judicial oversight and ability to enforce the obligations imposed by the parties." *Id.* at 12a (internal quotation marks and citation omitted). Applying that standard, the court determined that the order at issue "lacked all of the core indicia of a consent decree." *Id.* at 14a-15a. The court of appeals explained that the district court "did not order USCIS to do anything"; the district court "made no evaluation at all of the merits of the controversy" but instead merely "dismiss[ed] the case"; and the order "did not contain provisions for future enforcement typical of consent decrees." *Id.* at 15a-16a. The court of appeals concluded

that "[t]he order remanding to the agency is alone not enough to establish the needed imprimatur." *Id.* at 18a.[1]

The court of appeals next held that, for purposes of EAJA, the government's position was substantially justified. App., *infra*, 18a-28a. The court reasoned that "[t]he decision by the agency not to grant [petitioner] citizenship until his background check was completed, even if that exceeded 120 days, stemmed from two statutory mandates under which the agency must operate": *viz.*, the mandates that all applicants undergo background investigations and that such investigations must include full background checks by the FBI. *Id.* at 21a. The court acknowledged that, under the applicable regulatory requirements, USCIS was required to act on applications within 120 days of examinations (and that petitioner "was mistakenly given a premature initial examination"). *Id.* at 25a. The court nevertheless concluded that, "[a]t most, * * * this is a situation in which an agency has imposed regulatory requirements on itself that are in tension, and the solution it chose, to bend the 120-day rule because the background check was not completed, is entirely reasonable." *Ibid.* Conversely, the court added, "the choice by USCIS to favor national security in requiring a full check of the background of a

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[1] In a footnote, the court of appeals noted that the Tenth Circuit's decision in *Al-Maleki* v. *Holder*, 558 F.3d 1200 (2009), which had awarded fees under EAJA in similar circumstances, was "factually distinguishable" because the underlying order in that case "expressly direct[ed] the USCIS to administer the oath of citizenship to the applicant." App., *infra*, 15a n.12. After noting that distinction, however, the court added that its decision "should not be taken as agreement with the panel decision of the Tenth Circuit on this or any other point." *Id.* at 16a n.12.

citizenship applicant over a self-imposed 120-day deadline * * * cannot be unreasonable." *Ibid.*

The court of appeals rejected petitioner's contention that the government's position was not substantially justified because it "created an incentive system which requires candidates to sue to get priority in having FBI name checks done." App., *infra*, 27a-28a. The court reasoned that "the logic of [petitioner's] argument is to impose EAJA fees on [USCIS] in the numerous instances it has benefitted an applicant by giving priority to the applicant's name check." *Id.* at 27a.

b. Judge Lipez, joined by Judge Torruella, dissented. App., *infra*, 32a-59a. He contended that the majority's approach was "unwarranted, unwise, and contrary to the purpose and promise of the EAJA." *Id.* at 33a.

With regard to whether petitioner was a prevailing party, Judge Lipez first determined that the change in the legal relationship between petitioner and USCIS was court-ordered. App., *infra*, 39a-43a. He noted that, "[d]uring the litigation, only the district court possessed the authority to give [petitioner] the relief he requested," because USCIS lost jurisdiction to grant petitioner's application for naturalization once he filed suit. *Id.* at 39a. For that reason, "there had to be an intervening judicial order before [petitioner] could obtain relief." *Id.* at 39a-40a. Judge Lipez explained that "the remand order mandated a change in the legal relationship of the parties—namely, that [petitioner's] status change from alien to citizen through an oath ceremony that would take place no later than November 8, 2006." *Id.* at 40a-41a. He stated that "[t]here is no mistaking the district court's meaning here," because "[i]ts remand order incorporated by reference the joint motion of the parties and thereby ordered USCIS to fulfill the promise that it

made to [petitioner] and the court in the joint motion." *Id.* at 41a. Indeed, Judge Lipez noted, "[t]his was the district court's own understanding of its order." *Ibid.*

Judge Lipez next determined that the district court had satisfied the requirements for entering a consent decree. App., *infra*, 43a-46a. He noted that "[t]he complaint identified the factual and legal bases for providing relief" and that "[t]he joint motion isolated the relevant facts and law[] and asserted 'good cause' for remanding to the agency for naturalization." *Id.* at 45a. Thus, he reasoned, "the record contains adequate facts to support the court's decision to approve the proposed agreement and incorporate it in an order of the court." *Id.* at 46a.

Judge Lipez then determined that the district court retained jurisdiction to enforce its order in the event of noncompliance. App., *infra*, 46a-47a. He explained that the district court's incorporation in its order of the terms of the joint motion "was sufficient to retain jurisdiction for purposes of future enforcement." *Id.* at 47a. "Given this circumstance," he added, "if USCIS had failed to comply with the remand order, [petitioner] could have asked the court to issue an injunction confirming the naturalization obligation of USCIS and ordering compliance with it." *Id.* at 47a n.8. For all of the foregoing reasons, Judge Lipez concluded, "the court's remand order was the functional equivalent of a consent decree, and [petitioner] was a prevailing party." *Id.* at 48a-49a.[2]

With regard to whether the government's position was substantially justified, Judge Lipez contended that the majority's analysis "misconstrues what is at stake in this case." App., *infra*, 51a. He observed that "[t]here is

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[2] Judge Lipez noted that the Tenth Circuit's decision in *Al-Maleki* was "strongly supportive of [his] analysis." App., *infra*, 49a n.9.

no challenge to the authority of USCIS to adopt the name check program as a policy"; instead, "[w]hat is challenged is the application of that policy in this instance." *Ibid.* Judge Lipez asserted that, "[a]lthough the majority acknowledges that the agency has adopted a regulation * * * that treats the 120-day time frame as a deadline, the majority regards the statutory and regulatory frame as merely aspirational, with no consequences for the agency if it fails to comply." *Id.* at 52a. Citing a "flood" of similar lawsuits under Section 1447(b), he noted that "it was the agency's *regular practice* to violate its own regulations by examining candidates before receiving [background investigation] results, and then to compound that error by missing the statutory and regulatory adjudication deadline." *Id.* at 54a. It would be "an indulgent reasonable person," Judge Lipez continued, "who would view this government conduct so benignly." *Ibid.*

Judge Lipez added that "USCIS could have addressed the name check delay in a manner consistent with the applicable laws and regulations," by conducting background investigations before examinations (and, where they had "mistakenly" conducted the examinations first, by expediting the background investigations for those applicants). App., *infra*, 57a. "What the agency surely cannot do with 'substantial justification,'" however, "is blatantly ignore the requirements imposed on it by Congress and by itself." *Ibid.*

Judge Lipez concluded that "[t]he majority's fierce embrace of the government's opposition to this modest award is out of all proportion to the stakes." App., *infra*, 59a. He contended that "[the majority's] refusal to credit the district court's explanation of its remand order is unprecedented," and "[i]ts invocation of national security

concerns to justify the government's handling of [petitioner's] application is unjustified." *Ibid.*

c. Judge Torruella also dissented. App., *infra*, 29a-32a. He wrote separately to criticize the majority for applying "varying standards when judging governmental power as compared to those that apply to citizen challenges to government authority." *Id.* at 29a. In Judge Torruella's view, the majority "adopt[ed] amorphous policy interests alleged by the government through bombastic exaggeration and doomsday predictions in its en banc petition," *id.* at 29a-30a, and improperly "reli[ed] on the government's attenuated insinuations that our national security will be threatened by ruling against it," *id.* at 31a-32a.[3]

REASONS FOR GRANTING THE PETITION

In this case, the en banc First Circuit held that an applicant for naturalization who brings suit under 8 U.S.C. 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is not entitled to attorney's fees and costs under the Equal Access to Justice Act. That decision conflicts with a decision of the

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[3] Judge Torruella also asserted that the majority's decision conflicted with the Tenth Circuit's decision in *Al-Maleki*. App., *infra*, 31a n.3. Specifically, he contended that the majority's decision "effectively * * * create[d] a circuit split" because "the functional posture of both cases is the same: the district court agreed with the parties' joint request for remand for the purpose of allowing the plaintiff's application [for naturalization]." *Ibid.* He criticized the majority for "simultaneously admit[ting] that [*Al-Maleki*] may be contrary to its view while attempting to distinguish it on the thinnest of grounds": primarily, on the ground that "the remand order in that case was slightly more detailed." *Ibid.* "These differences in formatting," Judge Torruella concluded, "are not relevant to the effect and force of the remand order." *Ibid.*

Tenth Circuit involving materially identical facts; it presents an issue that has recurred with great frequency in the lower courts; and it implicates broader uncertainty among the lower courts on the issue of when a court order renders a party "prevailing" for purposes of EAJA. The First Circuit's analysis, moreover, was deeply flawed, because an applicant who obtains a court-ordered remand under these circumstances is a "prevailing party" in any sense of that phrase, and the government's position in failing to comply with an unambiguous regulatory obligation cannot plausibly be said to be substantially justified. As the government has previously recognized, this case presents an issue of exceptional importance, and it constitutes an excellent vehicle in which to consider the issue. In short, this case meets all of the Court's criteria for further review, and certiorari should therefore be granted.

A. The Decision Below Conflicts With A Decision Of The Tenth Circuit And Implicates Broader Disarray Among The Lower Courts

1. The decision of the en banc First Circuit conflicts with the decision of the Tenth Circuit in *Al-Maleki* v. *Holder*, 558 F.3d 1200 (2009). This Court should intervene to resolve that conflict.

a. In *Al-Maleki*, as in this case, an applicant for naturalization brought suit under Section 1447(b) after USCIS erroneously conducted an examination before completing its background investigation, then failed to act on his application within the prescribed 120-day period. 558 F.3d at 1203. In the lawsuit, the applicant asked the court either to adjudicate his application or to order USCIS to do so. *Ibid.* After the district court refused to grant the government's motion for an open-ended remand to USCIS, the parties filed a joint motion to remand so that USCIS could grant the application for

naturalization and schedule the applicant for an oath ceremony by a specified date. *Ibid.* The district court granted the motion, and the applicant subsequently moved for attorney's fees under EAJA. *Ibid.*

Unlike the First Circuit in this case, the Tenth Circuit upheld the award of fees. The court first concluded that the applicant was a prevailing party. 558 F.3d at 1204-1206. It reasoned that "the district court resolved the litigation *before* USCIS could voluntarily naturalize [the applicant]." *Id.* at 1205. It added that the district court's order "placed the weight of judicial authority behind USCIS's stipulation that [the applicant] was entitled to be naturalized by imposing a *judicially enforceable* obligation on USCIS to naturalize [the applicant] by a date certain," and, as such, "provided the judicial imprimatur which is indispensable to the prevailing party determination." *Id.* at 1206. The court then concluded that the government's position was not substantially justified. *Id.* at 1206-1210. It explained that, even "ignor[ing] the uncontroverted fact that USCIS violated its own regulations by conducting [the applicant's] initial examination before the comprehensive background investigation was completed," *id.* at 1208, the government's actions were unreasonable because USCIS was able to expedite the applicant's background investigation, but did not do so until after he brought suit. *Id.* at 1209.

b. The Tenth Circuit's decision in *Al-Maleki* conflicts not only with the decision below, but also with unpublished decisions of the Fifth and Ninth Circuits. In *Othman* v. *Chertoff*, 309 Fed. Appx. 792 (5th Cir. 2008) (per curiam), a similarly situated applicant brought suit under Section 1447(b); the government subsequently filed an unopposed motion to remand the case to USCIS so that it could act on the application for naturalization

by a specified date. *Id.* at 793. After the district court granted the motion, it denied the applicant's motion for fees under EAJA, and the court of appeals affirmed. *Id.* at 793-794. The court of appeals held that the applicant was not a prevailing party because, notwithstanding the fact that the district court's order explicitly directed USCIS to act on the application by a specified date, "[t]he district court entered neither an enforceable judgment nor a consent decree"; as such, the court concluded, the order "lacked the 'judicial imprimatur' necessary to confer prevailing-party status on [the applicant]." *Id.* at 794.

In *Al-Shaibani* v. *Holder*, Nos. 08-35385, 08-35387 & 08-35388, 2009 WL 2257612 (9th Cir. July 29, 2009), similarly situated applicants brought suit under Section 1447(b); the parties subsequently agreed to remand the cases to USCIS, and the district court remanded on the condition that, if USCIS granted the applications for naturalization, it do so by a specified date. As in *Othman*, after the district court remanded, it denied the applicants' motions for fees under EAJA. The court of appeals summarily affirmed, reasoning that the district court's orders "did not require [USCIS] to do something directly benefitting the plaintiff[s] that [it] otherwise would not have had to do." *Id.* at *1 (internal quotation marks and citation omitted).

c. In this case, the en banc First Circuit suggested that, at least with regard to whether the applicant was a prevailing party, the Tenth Circuit's decision in *Al-Maleki* was factually distinguishable on the ground that the district court's order here, unlike the order at issue in *Al-Maleki*, did not expressly direct USCIS to act on the application for naturalization by a specified date. See App., *infra*, 15a n.12. However, as Judge Torruella pointed out in dissent—and as even the majority appears

to have acknowledged—that distinction is formalistic and ultimately illusory. See *id.* at 16a n.12 (stating, after noting that distinction, that the court's decision "should not be taken as agreement with the panel decision of the Tenth Circuit on this or any other point"); *id.* at 31a n.3 (dissenting opinion).[4]

It is true that, in this case, the district court simply entered a summary order granting the parties' joint motion to remand. See C.A. App. 50. That order, however, is naturally understood to incorporate the terms of the joint motion: specifically, the government's agreement to grant petitioner's application for naturalization by a specified date. That is evidently how the district court itself understood the order, see App., *infra*, 111a, and for good reason: as the district court suggested, if it had intended not to impose a judicially enforceable obligation to act on USCIS, it would simply have dismissed the action outright, as courts routinely do when parties in litigation reach a settlement that does not contemplate judicial enforcement. See *ibid.*[5] Instead, the district

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[4] In a letter bringing *Al-Maleki* to the en banc First Circuit's attention after oral argument, the government took a similarly ambivalent position. See Letter from Keith I. McManus, Senior Litigation Counsel, Office of Immigration Litigation, to Richard C. Donovan, Clerk of the Court, at 1 (Mar. 25, 2009) (contending that "this case is factually distinguishable from *Al-Maleki*," but conceding that "the two cases are somewhat similar" and that "there is at least some overlap between the arguments raised by the government in *Al-Maleki* and those advanced by [respondents] here").

[5] Notably, that is also how the Fifth Circuit understood the district court's order when it attempted to distinguish the panel's initial decision in this case. See *Othman*, 309 Fed. Appx. at 794 (noting that the district court in this case "ordered a particular result to be reached by [USCIS]").

court remanded the case—and, in so doing, retained the ability to take subsequent action in the event that the government failed to comply with its agreement to grant petitioner's application by the specified date.

Because the district court's order is functionally indistinguishable from the order at issue in *Al-Maleki*, the decisions in the two cases are in direct conflict. Nor will that conflict be resolved absent this Court's intervention, because the decision below was issued by the en banc First Circuit (and the government declined to seek en banc review of the Tenth Circuit's decision in *Al-Maleki*). The resulting conflict therefore merits the Court's review.

2. In addition to the foregoing conflict among the courts of appeals, the federal district courts are in complete disarray as to the availability of fees under EAJA for applicants who have brought suit, and obtained relief, under Section 1447(b). We are aware of at least 50 cases *since 2007* in which district courts have considered whether to award fees under EAJA in Section 1447(b) actions. In many of those cases, district courts have held that, where, as here, an applicant obtains a court-ordered remand (by means of a joint motion or stipulation) so that USCIS can grant his application for naturalization, the applicant is a prevailing party for purposes of EAJA. See, *e.g.*, *Irahim* v. *Chertoff*, No. 07-2415, 2009 WL 385782, at *2 (E.D. Cal. Feb. 10, 2009); *Berishev* v. *Chertoff*, 486 F. Supp. 2d 202, 205-206 (D. Mass. 2007); *Al-Ghanem* v. *Gonzales*, No. 06-320, 2007 WL 446047, at *2 (D. Utah Feb. 7, 2007). In fact, some courts have held that an applicant is a prevailing party even where the court orders a remand *over the applicant's objection*. See, *e.g.*, *Ali* v. *Mukasey*, 543 F. Supp. 2d 1272, 1274-1275 (W.D. Wash. 2008). By contrast, other courts, like the First Circuit in this case, have held that an applicant

who obtains a court-ordered remand so that USCIS can grant his application for naturalization is not a prevailing party. See, *e.g.*, *Wagner* v. *Chertoff*, 607 F. Supp. 2d 1192, 1197-1199 (D. Nev. 2009).

Numerous district courts have also addressed the issue whether the government's position was substantially justified where, as here, the government erroneously conducted premature examinations of applicants for naturalization and then failed to comply with the 120-day deadline for acting on their applications. The vast majority of courts have held that the government's position was not substantially justified, often citing the fact that the government's obligation to comply with the 120-day deadline was unambiguous and nondiscretionary. See, *e.g.*, *Shalash* v. *Mukasey*, 576 F. Supp. 2d 902, 910-911 (N.D. Ill. 2008); *Osman* v. *Mukasey*, 553 F. Supp. 2d 1252, 1256-1258 (W.D. Wash. 2008); *Liu* v. *Chertoff*, 538 F. Supp. 2d 1116, 1122-1123 (D. Minn. 2008). As one court put it, "this is a mess of USCIS's own making," because "USCIS could have avoided the present problem entirely by following its own regulations." *Aboeleyoun* v. *USCIS*, No. 07-1927, 2008 WL 1883564, at *4 (D. Colo. Apr. 25, 2008). Like the First Circuit, however, a smaller number of courts have held that the government's position was substantially justified. See, *e.g.*, *Wagner*, 607 F. Supp. 2d at 1199-1201; *Almudallal* v. *USCIS*, No. 07-2040, 2008 WL 1995360, at *3-*4 (N.D. Ohio May 5, 2008); *Simonovskaya* v. *Chertoff*, No. 06-11745, 2007 WL 210391, at *1-*2 (D. Mass. Jan. 26, 2007). The chaos in the district courts, as to each relevant prong of the EAJA inquiry, provides an additional justification for further review here.

3. This case also implicates broader uncertainty among the courts of appeals as to when a court order renders a party "prevailing" for purposes of EAJA. In

Buckhannon, this Court indicated that the relevant inquiry is whether there was a "judicially sanctioned change in the legal relationship of the parties," or "judicial *imprimatur* on the change." 532 U.S. at 605. As examples of cases in which the necessary imprimatur exists, the Court cited "enforceable judgments on the merits and court-ordered consent decrees." *Id.* at 604.

In cases in which the order in question "falls somewhere between a consent decree and a purely private settlement in the degree of judicial involvement," however, courts of appeals have struggled since *Buckhannon* to determine "how much or what kind of judicial imprimatur must be stamped on [a court order] before it renders a party 'prevailing.'" *Utility Automation 2000, Inc.* v. *Choctawhatchee Electric Cooperative, Inc.*, 298 F.3d 1238, 1250 (11th Cir. 2002) (Marcus, J., specially concurring).[6] Those courts have taken three general approaches. On one end of the spectrum, at least one court of appeals has adopted the hard-line position that, unless a court order "serves essentially as a consent decree," it cannot render a party "prevailing," even if the issuing court retained jurisdiction to enforce the terms of the parties' agreement. *Christina A. ex rel. Jennifer A.* v. *Bloomberg*, 315 F.3d 990, 993-994 (8th Cir. 2003). Notably, in its brief to the en banc First Circuit in this case, the government took a similarly rigid position, arguing in the first instance that "*Buckhannon* limit[ed] its holding to *actual* consent decrees" and that "requiring an actual

[6] The other major issue on which courts of appeals have disagreed in the wake of *Buckhannon* is whether, in the absence of a final judgment, a party that obtains a preliminary injunction may qualify as a prevailing party for purposes of EAJA. This Court recently reserved that question. See *Sole* v. *Wyner*, 551 U.S. 74, 85 (2007).

consent decree before awarding fees provides a bright-line rule that can easily be applied." Gov't C.A. Supp. Br. 5.

Most courts of appeals have read *Buckhannon* more broadly and held that, as long as an order operates as the "functional equivalent" of a consent decree, it can confer prevailing-party status. Even among those courts, however, there are substantial differences in approach. Some courts have taken a more avowedly functional approach and focused on two factors: (1) whether the issuing court conducted some substantive review of the terms of the parties' agreement, and (2) whether the court retained jurisdiction to enforce those terms. See, *e.g.*, *Bell* v. *Board of County Commissioners*, 451 F.3d 1097, 1103 (10th Cir. 2006); *Smalbein ex rel. Estate of Smalbein* v. *City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (per curiam); *Roberson* v. *Giuliani*, 346 F.3d 75, 82-83 (2d Cir. 2003); *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268, 280-285 (4th Cir.), cert. denied, 537 U.S. 825 (2002). Other courts have taken a similar but more formalistic approach and considered factors such as whether the court order was styled as an order, contained mandatory language, and bore the judge's signature. See, *e.g.*, *Walker* v. *Calumet City*, 565 F.3d 1031, 1035 (7th Cir. 2009); *Davy* v. *CIA*, 456 F.3d 162, 166 (D.C. Cir. 2006); *John T. ex rel. Paul T.* v. *Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003).

Finally, at the other end of the spectrum, at least one court of appeals has taken a still more expansive view of what constitutes the necessary "judicial imprimatur," requiring only that the court order at issue provide "some judicial sanction" of the parties' agreement. *P.N.* v. *Seattle School District No. 1*, 474 F.3d 1165, 1173 (9th Cir. 2007). Thus, that court has held that an order spe-

cifically referring to a settlement agreement (and reflecting the parties' understanding of the binding nature of the agreement) could confer prevailing-party status, based on the totality of the circumstances, even though the issuing court apparently conducted no substantive review of the agreement's terms and did not retain jurisdiction to enforce them. See *Richard S.* v. *Department of Developmental Services*, 317 F.3d 1080, 1088 (9th Cir. 2002).

A decision by the Court in this case would therefore not only resolve the circuit conflict on the availability of fees under EAJA in Section 1447(b) actions, but also shed badly needed light on the broader issue of what type of order is sufficient to render a party "prevailing" under EAJA (and other fee-shifting statutes). The Court's review is therefore warranted.

B. The Court Of Appeals' Decision Is Erroneous

The en banc First Circuit erred, moreover, in holding that an applicant for naturalization who brings suit under Section 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is not entitled to attorney's fees and costs under EAJA. That holding was flawed in two critical respects.

1. The court of appeals first erred by concluding that, for purposes of EAJA, petitioner was not a prevailing party. See App., *infra*, 8a-18a. In *Buckhannon*—the pathmarking decision on prevailing-party status under fee-shifting statutes such as EAJA—this Court rejected the "catalyst theory," under which a plaintiff could be a prevailing party "if it achieve[d] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" (in that case, because the plaintiffs' lawsuit had triggered the repeal of the statutory provisions at issue). 532 U.S. at 600-601. In rejecting

the "catalyst theory," the Court observed that a prevailing party is one that "has been awarded some relief *by the court*." *Id.* at 603 (emphasis added). The Court therefore distinguished between cases involving a "voluntary change in conduct," on the one hand, and cases involving a "judicially sanctioned change in the legal relationship of the parties" or "judicial *imprimatur* on the change," on the other. *Id.* at 605. As noted above, see p. 19, *supra*, the Court cited "enforceable judgments on the merits and court-ordered consent decrees" as examples of cases in which the necessary imprimatur exists. 532 U.S. at 604.

Where, as here, a court in a Section 1447(b) action issues a remand so that USCIS can grant an application for naturalization, the court's order works the necessary "judicially sanctioned change in the legal relationship of the parties" for purposes of *Buckhannon*. As a threshold matter, it is clear, and the government does not contend otherwise, that a material "change in the legal relationship of the parties" occurs in cases such as this one, because the applicant goes from having an application for naturalization pending to having it acted upon and granted. See, *e.g.*, App., *infra*, 40a-41a (Lipez, J., dissenting); *id.* at 66a (panel opinion); *id.* at 110a (district court order). That change, moreover, is "judicially sanctioned," because the remand order is indispensable to providing the applicant his desired relief. Absent some judicial action, USCIS would lack jurisdiction to act on the application for naturalization, see, *e.g.*, *Etape* v. *Chertoff*, 497 F.3d 379, 383-387 (4th Cir. 2007); *United States* v. *Hovsepian*, 359 F.3d 1144, 1159-1164 (9th Cir. 2004) (en banc), and it is therefore the "[e]ntry of the [remand] order" that "indelibly alter[s] the legal landscape between" the applicant and USCIS, *Al-Maleki*, 558 F.3d at 1206 (internal quotation marks and citation omitted). As

discussed above, moreover, the only plausible understanding of the remand order in this case is that it necessarily incorporated the government's commitment to act upon and grant petitioner's application for naturalization by a specified date, see pp. 16-17, *supra*—and, for that reason, the remand order contemplated the "judicial approval and oversight" that is absent from a voluntary dismissal pursuant to a settlement. *Buckhannon*, 532 U.S. at 604 n.7. Cases such as this one are therefore distinguishable from cases such as *Buckhannon*, because they possess the "stuff of which legal victories are made." *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987).

In reaching the contrary conclusion, the court of appeals focused on whether the remand order was the "functional equivalent of a consent decree"—or, as the court of appeals put it, "whether the order contains the sort of judicial involvement and actions inherent in a 'court-ordered consent decree.'" App., *infra*, 11a. In so doing, however, the court of appeals missed the forest for the trees, because *Buckhannon* merely cited "court-ordered consent decrees," along with "enforceable judgments on the merits," as non-exclusive *examples* of the types of orders that work the necessary judicially sanctioned change. 532 U.S. at 604.

In any event, even if the order in question must be identical (or, at a minimum, closely analogous) to the types of orders cited in *Buckhannon*, the remand order in this case satisfies that requirement. As a preliminary matter, notwithstanding the court of appeals' apodictic conclusion to the contrary, see App., *infra*, 10a, the remand order constituted the equivalent of an "enforceable judgment on the merits." By its terms, Section 1447(b) contemplates two forms of relief: (1) a "determin[ation] of the matter" by the district court itself, and (2) a "remand [of] the matter, with appropriate instructions, to

[USCIS] to determine the matter." In the complaint in this case, petitioner sought both forms of relief, see C.A. App. 57, and he ultimately obtained the latter, see *id.* at 50. The court of appeals' conclusion that the remand order was not tantamount to a judgment on the merits is in serious tension, and arguably in outright conflict, with this Court's decision in *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), in which the Court held that a statutorily authorized remand order to the Social Security Administration constituted a "final judgment" that triggered the time period for filing an EAJA application (and further indicated that the remand order rendered the plaintiff a prevailing party for EAJA purposes). See *id.* at 300-302.

Even if the remand order does not constitute the equivalent of an "enforceable judgment on the merits," however, it is closely analogous to a consent decree, because, like a consent decree, it provides judicial sanction for the terms of the parties' agreement. See pp. 22-23, *supra*. In reaching the contrary conclusion, the court of appeals devised a three-part test for determining whether a court order is sufficiently analogous to a consent decree, under which "the change in legal relationship must be court-ordered"; "there must be judicial approval of the relief vis-à-vis the merits of the case"; and "there must be judicial oversight and ability to enforce the obligations imposed on the parties." App., *infra*, 12a (internal quotation marks and citation omitted).

Assuming, *arguendo*, that the court of appeals' test is the correct one, the court of appeals erred by concluding that the test was not satisfied here, largely for the reasons stated by Judge Lipez in his dissent. See App., *infra*, 39a-49a. As to the first requirement, the remand order did work a court-ordered change in the legal relationship, because it was indispensable in ensuring that petitioner's application for naturalization was acted upon

and granted. See *id.* at 39a-43a. As to the second requirement, the remand order provided judicial approval of the relief petitioner sought, because the joint motion to remand stated that there was "good cause" to remand the case for naturalization (and the district court possessed the authority to deny the motion if it disagreed). See *id.* at 43a-46a. And as to the third requirement, the district court retained the ability to take subsequent action in the event that the government failed to comply with its agreement to grant petitioner's application by the specified date. See *id.* at 46a-47a. Because the remand order worked a judicially sanctioned change (and in any event was either identical or analogous to a judgment on the merits or a consent decree), the court of appeals erred by concluding that, for purposes of EAJA, petitioner was not a prevailing party.

2. The court of appeals compounded that error by concluding that, for purposes of EAJA, the government's position was substantially justified. See App., *infra*, 18a-28a. The court of appeals' analysis rested entirely on a faulty premise: *viz.*, that, in processing petitioner's naturalization application, USCIS was subject to regulatory requirements that were "in tension," because it was required to conduct a detailed background investigation, on the one hand, but to process petitioner's application within 120 days of his examination, on the other. See, *e.g.*, *id.* at 25a. Assuming, *arguendo*, that USCIS was required to conduct the type of background investigation that it did, the court of appeals ignored the fact that USCIS could have satisfied both requirements by conducting the background investigation first (as USCIS's regulations require, see 8 C.F.R. 335.2(b)) and then acting on petitioner's application promptly after his examination. Far from "bend[ing] the 120-day rule," as the court of appeals euphemistically put it, App., *infra*, 25a, USCIS

utterly flouted that unambiguous obligation, and its decision to do so cannot be said to have been substantially justified. See, *e.g.*, *Role Models America, Inc.* v. *Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004); *Wilderness Society* v. *Babbitt*, 5 F.3d 383, 388-389 (9th Cir. 1993).

As in *Al-Maleki*, moreover, there is no reason to believe that USCIS could not have complied with the 120-day rule in this case even once it had committed its initial error of conducting petitioner's examination before completing his background investigation. See 558 F.3d at 1209. USCIS could have sought to expedite petitioner's background investigation—as, indeed, it did once petitioner actually brought suit. Respondents have not contended that USCIS was *unable* to do so; instead, at the time of petitioner's lawsuit, USCIS had a policy of expediting a background investigation only after an applicant filed suit to challenge the delay in processing his application. See C.A. App. 45.[7]

Aside from its acquiescence once petitioner brought suit, no aspect of the government's conduct in this case was substantially justified, and there is nothing inequitable about requiring the government to bear the modest cost of a suit that it effectively invited as a prerequisite of processing petitioner's naturalization application in a timely (or, to be accurate, somewhat less untimely) manner. Indeed, allowing applicants to recover fees in these circumstances would be wholly consistent with the underlying purposes of EAJA: namely, to "encourag[e] private parties to vindicate their rights and curb[]

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[7] Unsurprisingly, that policy provoked widespread criticism, and USCIS later revoked it. See USCIS, *Update: USCIS Clarifies Criteria To Expedite FBI Name Check* (Feb. 20, 2007) <tinyurl.com/uscispolicy>.

* * * [the] unreasonable exercise of Government authority." *INS v. Jean*, 496 U.S. 154, 164 (1990) (internal quotation marks and citation omitted). This Court should grant review in order to eliminate the circuit conflict on the availability of EAJA fees and correct the court of appeals' flawed and counterintuitive approach.

C. The Question Presented Is An Important And Recurring One That Merits The Court's Review In This Case

1. The question presented in this case—*i.e.*, whether an applicant for naturalization who brings suit under Section 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is entitled to fees under EAJA—is one of "exceptional importance," as the government itself contended in seeking rehearing en banc in the First Circuit. Gov't C.A. Pet. for Reh'rg 9; see Gov't C.A. Supp. Br. 1 (reiterating that "[t]his case presents questions of great legal and practical significance").

To begin with, the question presented has recurred with great frequency in the lower courts. Because it appears to have been USCIS's "regular practice" to conduct examinations of naturalization applicants before their background investigations were completed, App., *infra*, 54a (Lipez, J., dissenting) (emphasis omitted), and because USCIS frequently has been unable to complete those background investigations within the prescribed 120-day period, there has been a "flood" of litigation under Section 1447(b) in recent years, as the government has acknowledged. See Gov't C.A. Pet. for Reh'g 2. Although nationwide statistics are not readily available, in the First Circuit alone (the smallest of the regional circuits), approximately 137 actions were filed in 2007 seeking review of delayed naturalization applications, see App., *infra*, 20a n.16, and the government has repre-

sented that, as of September 2008, there were approximately 1,200 potential Section 1447(b) actions in the circuit, see Gov't C.A. Pet. for Reh'g 14. Applicants for naturalization, moreover, have sought fees under EAJA in many of those cases; as noted above, we are aware of at least 50 cases since 2007 in which district courts have considered whether to award EAJA fees in Section 1447(b) actions. See p. 17, *supra*.[8] As the government suggested below, while the amount of money at stake in any given case is often relatively modest, the cumulative amount of money at stake in these cases may therefore be substantial. See Gov't C.A. Pet. for Reh'g 15; Gov't C.A. Supp. Br. 16-17.

To be sure, USCIS has purportedly been taking steps to address the specific problem that triggered the litigation in this case: *viz.*, the lengthy delays in completing background investigations for naturalization applicants. Earlier this year, USCIS announced that the FBI was now completing its portion of background investigations within 90 days in all cases, though it cautioned at the same time that "any information provided by the FBI * * * may require further evaluation" (thus potentially "result[ing] in additional delays in processing"). USCIS, *USCIS, FBI Eliminate National Name Check Backlog* (June 22, 2009) <tinyurl.com/uscisbacklog>. Particularly given the notorious problems that have plagued USCIS (and its predecessor agency INS) over the years, there is no reason to believe that USCIS will suddenly start processing all naturalization applications in a timely manner, such that litigation under Section 1447(b)

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[8] That total, moreover, may understate the number of decisions on EAJA fees in Section 1447(b) actions, insofar as many orders on fee motions are not reported (or electronically available).

will disappear.[9] Indeed, Section 1447(b) was originally enacted in 1990—long before USCIS's recent problems with completing background investigations—for the specific purpose of affording a judicial forum to naturalization applicants in the event of processing delays, whatever their cause. See *Hovsepian*, 359 F.3d at 1163-1164 (discussing legislative history). Even if the causes for delay turn out to be different in future cases, therefore, the question presented in this case is likely to continue to recur, and thus warrants this Court's review.

As discussed above, moreover, a decision by the Court in this case would not only resolve the availability of fees under EAJA in Section 1447(b) actions, but also shed light on the broader issue of what is required to render a party a "prevailing party." See pp. 18-21, *supra*. As this Court has recognized, that issue arises in a broad range of contexts, because Congress regularly uses the phrase "prevailing party" as "a legal term of art" to "designat[e] those parties eligible for an award of litigation costs," *Buckhannon*, 532 U.S. at 603, and this Court has construed the phrase consistently across the many fee-shifting statutes in which it appears, see *id.* at 603 n.4. To take but a few examples, the phrase is used in the Americans with Disabilities Act, 42 U.S.C. 12205; the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k); and the Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B)(i). Regardless of the extent to which

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[9] In fact, even after USCIS's announcement, Section 1447(b) actions continue to be filed around the country challenging USCIS's failure to complete background investigations in a timely manner. See, *e.g.*, *Hernandez* v. *Swacina*, No. 09-22642 (S.D. Fla. filed Sept. 4, 2009); *Saraf* v. *Napolitano*, No. 09-1520 (D.D.C. filed Aug. 11, 2009); *Iqbal* v. *Dorochoff*, No. 09-4910 (N.D. Ill. filed Aug. 11, 2009); *Agbotse* v. *Napolitano*, No. 09-1115 (W.D. Wash. filed Aug. 5, 2009).

the question presented recurs in the specific context of Section 1447(b) actions, therefore, a decision in this case would unquestionably have broader significance.

2. This case is an optimal vehicle for the Court's review, because it cleanly presents the question whether an applicant for naturalization who brings suit under Section 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is entitled to fees under EAJA—a question on which the circuits are in direct conflict. The facts of this case are typical of those of other Section 1447(b) actions. And there would be no benefit from further percolation in the lower courts, because the majority and dissenting opinions from the en banc First Circuit (like the Tenth Circuit's conflicting opinion in *Al-Maleki*) are comprehensive and well-reasoned.

Finally, if the Court does not grant review in this case, it is far from clear when the Court will be able to consider the question presented again. Although there has been a large number of cases in which plaintiffs in Section 1447(b) actions have sought fees under EAJA (and there will surely be more such cases in the future), relatively few of those cases have reached the court of appeals level. That is probably because the amount of money sought in the typical fee request in a Section 1447(b) case is relatively modest, and, where an applicant is unable to obtain fees from a district court in the first instance, the applicant is unlikely to be willing to run the risk of incurring a substantially larger amount of fees in the event of an unsuccessful appeal. This may therefore be a situation in which the Court has surprisingly little opportunity to consider an issue that in fact recurs with great frequency in the lower courts—a consideration that further counsels in favor of review in this case.

* * * * *

Because of the government's inability to cope with the administrative burdens of the naturalization process, a whole generation of immigrants has had to wait for additional months, even years, to procure the benefits of citizenship. Under the court of appeals' decision in this case, those new Americans whom the government has forced to bring suit in order to expedite the process will be welcomed into citizenship not only with a miniature flag and a copy of the Constitution, but also with a bill from their attorney. The court of appeals' decision threatens to reward the government for its shabby conduct in failing to comply with its unambiguous obligation to process naturalization applications in a timely manner. As Judge Lipez noted in dissent, the outcome here is "contrary to the purpose and the promise of the EAJA." App., *infra*, 59a. This Court should not allow that outcome to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-1588

ALEXANDRE ARONOV, Plaintiff, Appellee,

v.

JANET NAPOLITANO,* et al., Defendants,
Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

April 13, 2009

Before LYNCH, Chief Judge, TORRUELLA, BOUDIN, LIPEZ, and HOWARD, Circuit Judges.

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* Pursuant to Fed. R. App. P. 43(c)(2), Janet Napolitano, Secretary of the U.S. Department of Homeland Security, has been substituted for former Secretary Michael Chertoff.

OPINION EN BANC

LYNCH, Chief Judge.

This case concerns the standards for an award of attorneys' fees against an agency of the United States under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). The Act requires such an award for a successful litigant who meets the particularized standards for being a "prevailing party," when the government's position, either before or after suit was filed, was not substantially justified, and provided that the award of fees would not otherwise be unjust. *Id.*; *see also generally Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16 (1st Cir. 2005).

Alexandre Aronov, an applicant for citizenship, sued the U.S. Citizenship and Immigration Service ("USCIS"), which immediately entered into a voluntary settlement and never filed a responsive pleading. Instead the parties filed a joint motion to remand. The district court issued a one-line order granting the joint motion to remand and terminating the case. No hearing was ever held by the district court. The order remanded to the USCIS, which swore in Aronov as a citizen on November 8, 2006, as it had represented in the joint motion that it would do.

Aronov, newly a citizen, then filed an application for fees and costs under the EAJA, which the district court granted in the sum of $4,270.94, over the opposition of the USCIS. The USCIS appealed. The award was originally upheld by a panel, over a dissent.

The USCIS sought en banc review, arguing that the panel decision, if left standing, would have dangerous systemic consequences far beyond this case. The

precedent would "create[ ] an enormous incentive for individuals frustrated with delays in the naturalization process to file mandamus lawsuits in this Circuit; [and would] create[ ] an enormous disincentive for the agency to settle these cases by agreeing to grant naturalization." It argued the panel decision was contrary to law and "undermine[d] the uniform judgment of both Congress and the agency that background checks are critical to insuring public safety and national security." While the sum awarded in this case might be small, it said, the potential economic consequences were quite large. This court granted en banc review.[1]

We now reverse the award of fees and order dismissal of Aronov's EAJA application with prejudice on the two separate and independent grounds that he was not a prevailing party and that, whether or not he met the prevailing party requirement, USCIS's position in requiring an FBI name check was substantially justified. The key question is not whether a court ultimately agrees with the agency's reading of its legal obligations but whether the agency's position was substantially justified.

I.

Aronov's suit, filed on August 28, 2006, was brought under 8 U.S.C. § 1447(b), which allows an applicant for citizenship to seek relief in federal district court if the USCIS does not act on the application within 120 days of his or her citizenship interview examination. Section 1447(b) provides in full:

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[1] We acknowledge with appreciation the assistance provided by the amicus American Immigration Lawyers Association.

> If there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the [USCIS] to determine the matter.

8 U.S.C. § 1447(b).

There are no disputed facts. Aronov, a native of Russia and permanent U.S. resident since 2001, submitted an application for citizenship to the USCIS on May 22, 2004. On February 14, 2005, a USCIS officer examined Aronov before the agency received a full FBI background check for him, contrary to USCIS regulations. The officer informed him that his application could not be approved until additional security checks were completed.

The USCIS erred by examining Aronov prematurely. By regulation, the agency may not schedule an interview, which starts the 120-day clock for filing suit under § 1447(b), until a full FBI background check for the applicant is complete. *See* 8 C.F.R. § 335.2(b) (the USCIS will schedule interviews "only after [it] has received a definitive response from the [FBI] that a full criminal background check of an applicant has been completed").

Mistakes happen. Nevertheless, the error was harmless[2] and accrued to Aronov's benefit. The early interview meant he was immediately eligible for citizenship upon successful completion of the FBI background check and, under the literal terms of § 1447(b), was able to bring suit if the agency did not act on his application within 120 days.

On March 23, 2006, the USCIS sent Aronov written notice that additional review of his case was necessary and asked Aronov to contact the agency if he did not receive a notice of action within six months.

Instead, Aronov sued. The USCIS did not file a responsive pleading. On October 6, 2006, Aronov and the government, having settled the case, filed a Joint Motion for Remand, stating that "USCIS ha[d] completed its review of plaintiff's application for naturalization and, if jurisdiction [were] returned to the agency, [USCIS] would grant the application and schedule plaintiff's oath ceremony for no later than November 8, 2006" and requesting that the court "remand the matter to USCIS so that it [could] grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006." Except on paper, the parties did not even appear before the court, there were no hearings and no representations were made about the parties' negotiations or the history of the matter. On Oc-

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[2] *See generally Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007) ("In administrative law . . . there is a harmless error rule." (quoting *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004))).

tober 12, 2006, the court entered an electronic order,[3] which stated in full:

> Electronic ORDER granting [Docket Number] 3 Joint Motion to Remand to U.S. Citizenship and Immigration Services.

That remand order forms the basis for the EAJA award at issue. By order dated January 30, 2007, the district court awarded fees on the basis that its order was a remand to the agency to do something and so met the judicial imprimatur requirement. The government, it found, unjustifiably delayed the petition, forced Aronov to file his action, and allowed for expedition only after mandamus was filed.

II.

The EAJA provides in relevant part:

> [A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

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[3] The parties agree the order was a final judgment; EAJA applications may not be filed until there is a final judgment. *See* 28 U.S.C. § 2412(d)(1)(B), (d)(1)(D)(2)(G); *see also Melkonyan v. Sullivan*, 501 U.S. 89, 97 (1991).

28 U.S.C. § 2412(d)(1)(A).

The purpose of the Act is "to ensure that certain individuals . . . will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved." *Scarborough v. Principi*, 541 U.S. 401, 407 (2004) (quoting H.R. Rep. No. 99-120(I), at 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 132-33). The EAJA "reduces the disparity in resources between individuals . . . and the federal government." H.R. Rep. No. 99-120(I), at 4.

Two issues are raised: (1) whether Aronov met the "judicial imprimatur" requirement of the "prevailing party" test; and (2) whether the USCIS has met its burden of showing that it did not act unreasonably.

We review a district court's determinations under the EAJA for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558-59 (1988); *Schock v. United States*, 254 F.3d 1, 4 (1st Cir. 2001). An error of law is an abuse of discretion. *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir. 2003); *see also Atl. Fish Spotters Ass'n v. Daley*, 205 F.3d 488, 491 n.2 (1st Cir. 2000). Whether a party is a prevailing party is itself a legal determination subject to de novo review. *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1021 (Fed. Cir. 2005); *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002). The district court's award rests on errors of law.

The EAJA is a departure from the traditional "American rule" that parties must ordinarily bear their own attorneys' fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Importantly, the EAJA is not simply a fee shifting statute. The EAJA is also a waiver by the government of its sovereign immuni-

ty and so must be construed strictly in favor of the government. *Ardestani v. INS*, 502 U.S. 129, 137 (1991). Whatever flexibility there may be in interpreting fee shifting statutes involving awards against parties other than the United States, such flexibility does not exist as to EAJA applications. *See Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957))).

A. The Judicial Imprimatur Standard Under the Prevailing Party Requirement of the EAJA

We hold as a matter of law that Aronov is not a prevailing party under the order entered by the district court.

The Supreme Court set the general standards for defining the term "prevailing party" in federal attorneys' fees shifting statutes in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), a case concerned with fee statutes other than the EAJA.[4] *Buckhannon* sets the minimum standards for prevailing party status under the EAJA. "[T]he Supreme Court's reasoning in '*Buckhannon* is presumed to apply generally to all fee-shifting statutes that use the prevailing party terminology.'" *Smith*, 401 F.3d at 22 n.8 (quoting *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 25 (1st Cir. 2004)) (internal quotation marks omitted); *accord Ma v. Chertoff*, 547

[4] *Buckhannon* involved provisions of the Federal Housing Amendments Act of 1988, 42 U.S.C. § 3613(c)(2) and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12205.

F.3d 342, 344 (2d Cir. 2008) (per curiam) (collecting cases).

"[T]he term 'prevailing party' [is] a legal term of art." *Buckhannon*, 532 U.S. at 603. To be a prevailing party, a party must show both a "material alteration of the legal relationship of the parties," *id.* at 604 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)), and a "judicial imprimatur on the change," *id.* at 605.

Both terms are illuminated by the potential meanings *Buckhannon* rejected: the Supreme Court held that mere success in accomplishing a party's objectives is insufficient to be a prevailing party for a fee award. *Buckhannon*, 532 U.S. at 606. The Court rejected the "catalyst" theory which had been accepted by many circuits, including this one.[5] The Court noted that use of the catalyst theory would have the adverse effect of discouraging the government from voluntarily settling cases (pre-suit or post-suit). *See id.* at 608 (noting the "disincentive that the 'catalyst theory' may have upon a defendant's decision to voluntarily change its conduct"). The Court stated that its plain language approach served the purpose of providing a clear formula allowing for ready administrability and avoiding the result of a second major litigation over attorneys' fees. *See id.* at 609-11.

Buckhannon explicitly identified two and only two situations which meet the judicial imprimatur requirement: where plaintiff has "received a judgment on the

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[5] *Buckhannon* thus overruled this circuit's prior acceptance of the catalyst theory in *Guglietti v. Secretary of Health & Human Services*, 900 F.2d 397 (1st Cir. 1990) (applying EAJA), followed in *Paris v. United States Department of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993) (same).

merits," which does not apply here, or "obtained a court-ordered consent decree." *Id.* at 605. The Court was clear that "settlement agreements enforced through a consent decree" may be the basis for fee awards and the resulting change in the legal relationship between the parties must be "court-ordered." *Id.* at 604 (emphasis added). The change in the legal relationship must be a "judicially sanctioned change." *Id.* at 605.[6] Notably, *Buckhannon*, which affirmed the judgment of the Fourth Circuit in denying fees, did not adopt that portion of the Fourth Circuit rule which permitted an award of fees for a "settlement giving some of the legal relief sought" in addition to fees for an "enforceable judgment [or] consent decree." *Id.* at 602.

The order here was plainly not a judgment on the merits, nor was it labeled a "court-ordered consent decree." That, however, does not end the matter. We agree with other circuits that the formal label of "consent decree" need not be attached;[7] it is the reality, not the no-

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[6] The Court said these requirements were imposed by the plain language of the statute and while there was no need to resort to legislative history, that history was consistent with these requirements. *Buckhannon*, 532 U.S. at 607-08. We reject Aronov's arguments that the legislative history supports a broader approach.

[7] *See, e.g.*, *Davy v. CIA*, 456 F.3d 162, 166 (D.C. Cir. 2006) (holding, under the attorneys' fee provision of the Freedom of Information Act, that an award was appropriate even though the court's order was "styled 'order' as opposed to 'consent decree'"); *see also Rice Servs.*, 405 F.3d at 1026-27 (EAJA); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003) (Individuals with Disabilities Education Act); *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir. 2003) (42 U.S.C. § 1988); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (same); *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir. 2002) (ADA); *Smyth*, 282 F.3d at 276 (§ 1988).

menclature which is at issue. Sometimes the question has been phrased in terms of whether a given court order is the "functional equivalent of a consent decree"; the better articulation may be to ask whether the order contains the sort of judicial involvement and actions inherent in a "court-ordered consent decree." The district court did not allow EAJA fees on the basis that the order it entered was the equivalent of a consent decree. Rather, it said in its award order that it entered the award on the ground that it had entered an order compelling the agency to take action, which it thought was sufficient to support an award. Indeed, Aronov never argued to the district court that this situation was so like a consent decree as to constitute the requisite judicial imprimatur. Nonetheless, the consent decree theory is the primary grounds now asserted, and the parties have addressed the issue to the en banc court. We bypass his waiver and address the argument.[8]

The Supreme Court has described what it meant by a "court-ordered consent decree." It distinguished such consent decrees from "private settlements" (as to which fees may not be awarded), saying "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees." *Id.* at 604 n.7. *Buckhannon* contrasted final judgments on the merits and court-ordered consent decrees with situations which failed to meet the judicial imprimatur test: for example, securing the reversal of a directed verdict, acquiring a judicial pronouncement that a defendant has violated the Constitution unaccompanied by "judicial relief," or obtaining a

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[8] There is no basis, as a result, to consider deference to nonexisting "findings" of the district court, as to whether this was the equivalent of a consent decree.

non-judicial "alteration of actual circumstances." *Id.* at 605-06.

The Court emphasized three related factors. The first was that the change in legal relationship must be "court-ordered." *See id.* at 604. Second, there must be judicial approval of the relief vis-à-vis the merits of the case. *Buckhannon* cited *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 381 (1994), which held a "judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order." Third, there must be judicial oversight and ability to enforce the obligations imposed on the parties. *See Buckhannon*, 532 U.S. at 604 n.7 (noting that judicial oversight is inherent in consent decrees but not in private settlements).

These factors from *Buckhannon* are themselves, not surprisingly, contained in the law of consent decrees. A consent decree "embodies an agreement of the parties," that they "desire and expect will be reflected in, and be enforceable as, a judicial decree." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992)); *see also Ricci v. Patrick*, 544 F.3d 8, 17 (1st Cir. 2008), *cert. denied*, ___ U.S. ___, 2009 WL 229763 (Apr. 6, 2009). As the Fourth Circuit noted in *Smyth*:

> A consent decree, because it is entered as an order of the court, receives court approval and is subject to the oversight attendant to the court's authority to enforce its orders, characteristics not typical of settlement agreements. [*Buckhannon*]'s admonition that consent decrees may satisfy the prevailing party standard while private settlements ought not be so construed

> is thus consistent with the general purposes and effects of the two forms of resolution of disputes.

Smyth, 282 F.3d at 281. Court approval of a consent decree must involve some appraisal of the merits. *See id.* at 279. By contrast, a private settlement does not, ordinarily, receive court approval. *Id.* at 280. A court entering a consent decree must examine its terms to be sure they are fair and not unlawful. *See id.*; *see also T.D.*, 349 F.3d at 479 ("Mere involvement [by the court] in a settlement . . . is not enough. There must be some official judicial approval of the settlement."). As an example, the Third Circuit held in *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 558-60 (3d Cir. 2003), that neither a preliminary injunction nor a contempt order based on that injunction contained the necessary judicial imprimatur because neither had required the court to weigh the merits of the underlying dispute.[9]

Further, an obligation to comply and the provision of judicial oversight to enforce that obligation are the sine qua non for a consent decree. *See Smyth*, 282 F.3d at 279-81; *see also Roberson*, 346 F.3d at 82-83; *Am. Disability Ass'n*, 289 F.3d at 1320. While a consent decree begins as a settlement, it is one that "includes an injunction, or some other form of specific relief," which may ultimately be enforceable by contempt. Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* § 98, at 702 n.2 (6th ed. 2002). This means enforcement

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[9] A consent decree, which has attributes both of contracts and of judicial decrees, *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986), must, therefore, go beyond contractual obligations.

through an action for breach of contract, which may be available in a private settlement, is insufficient to meet the standards for a consent decree. *See Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

"The parties to a consent decree expect and achieve a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order." *Smyth*, 282 F.3d at 280. A private settlement agreement, by contrast, does not require the same level of judicial oversight.

Another characteristic of the judicially approved obligations in a consent decree is that a party seeking to modify a consent decree must meet a significant burden to demonstrate that circumstances have changed to a degree that justifies a modification. *See generally Rufo*, 502 U.S. at 378-83; *see also* Fed. R. Civ. P. 60(b). This is so because, by its nature, a consent decree contemplates a court's continuing involvement in a matter.[10]

Application of these principles necessarily results in the conclusion the order entered here did not meet the judicial imprimatur standards for a prevailing party. Whether an order contains a sufficient judicial imprimatur can only be determined by determining the content of the order against the entire context before the court. The order here lacked all of the core indicia of a consent

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[10] In *Pierce*, a pre-*Buckhannon* case where the Supreme Court affirmed an award of EAJA fees, the district court administered and enforced the settlement agreement reached. *See Pierce*, 487 U.S. at 556 (noting that the government had created a $60 million settlement fund and that a California federal court had taken responsibility for administering the settlement).

decree. The court did not order USCIS to do anything.[11] The court made no evaluation at all of the merits of the controversy—indeed the court was never asked to do so; it was only asked to dismiss the case. There was no basis on which the court could evaluate the merits because the USCIS never filed an answer, never raised the potential defenses it had, and there never was an engagement of any sort on the merits for the district court to consider.[12]

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[11] We need not address what the proper vehicle would have been had the USCIS failed to carry through with its representation that it would grant citizenship. But it is clear that the district court erred in concluding it could directly hold the USCIS in contempt in such circumstances because the order did not issue a mandate to the USCIS. Before a court can find a party in contempt for violating an order, it must conclude that "the words of the court's order have clearly and unambiguously forbidden the precise conduct on which the contempt allegation is based." *United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005) (emphasis in original); *see also id.* ("[T]he test is whether the putative contemnor is 'able to ascertain from the four corners of the order precisely what acts are forbidden.'" (emphasis added) (quoting *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002))). A consent decree may itself contain mandatory language that is directly enforceable by a contempt action.

[12] This case is factually distinguishable from the Tenth Circuit's recent decision in *Al-Maleki v. Holder*, 558 F.3d 1200 (10th Cir. 2009). There, the court upheld an award of fees under the EAJA where the district court, after the case was filed, denied the government's initial motion for an unrestricted remand after a hearing, ordered the government to file an answer, accepted the representations in the answer, then granted a joint motion to remand, and entered an order expressly directing the USCIS to administer the oath of citizenship to the applicant, Abbas Al-Maleki. The court found an order directing the agency to act was required because, as the court noted, "at the time the district court's order was entered, USCIS had not yet naturalized Al-Maleki or made a binding commitment to do so." *Id.* at 1205. Here, there were no such proceedings. No such order was entered; the court only remanded to the agency for it to

Further, the order itself did not contain provisions for future enforcement typical of consent decrees. *See Kokkonen*, 511 U.S. at 381; *Saccoccia*, 433 F.3d at 28. The order also did not resolve a dispute between the parties, it merely returned jurisdiction to the agency to allow the parties to carry out their agreement.[13] Indeed, the order

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act on its promise to grant citizenship. Our pointing out these factual distinctions should not be taken as agreement with the panel decision of the Tenth Circuit on this or any other point.

[13] The dissenters appear to characterize the district court as either having essentially issued an injunction requiring the agency to perform certain actions or as somehow having turned the remand into a consent decree. The dissenters' reading is not based on the actual October 12, 2006 remand order, but on the district court's later characterization of the order. The argument is flawed for a number of reasons. First, the district court itself did not at any time characterize itself as having issued an injunction or as having approved a consent decree which incorporated other terms into its order, and properly so. The requirements of Rule 65 were never met nor sought to be met nor was this presented as a consent decree.

Second, the October 12, 2006 order on its face is merely an allowance of a motion to remand, it was not an injunction nor did it incorporate anything else. On its face, the order was unambiguous and lacked any provision mandating the USCIS to act or expressly retaining jurisdiction to force the government to act. While the allowance of motions for remand after litigation may meet the EAJA criteria for judicial imprimatur, this did not.

Third, while a district court's later characterization of what it had intended in an earlier order may at times be helpful, this situation does not fall into any of the usual patterns. For example, the district court was not involved in settlement negotiations which enabled it to shed light on the nature of the settlement. *See F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir. 2006). Nor was this an issue of whether statements from the bench were meant to be a judicial order. *See New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002). Nor was there any ambiguity in its October 12 order. *See Harvey v. Johanns*, 494 F.3d 237, 242 (1st Cir. 2007).

would not create prevailing party status under the tests adopted by any of the circuits. *See, e.g.*, *Davy*, 456 F.3d at 165-66; *Rice Servs.*, 405 F.3d at 1027; *T.D.*, 349 F.3d at 478; *Roberson*, 346 F.3d at 81; *Truesdell*, 290 F.3d at 165; *Am. Disability Ass'n*, 289 F.3d at 1320-21; *Smyth*, 282 F.3d at 276.

Aronov's argument is also inconsistent with *Smith*, which held that the fact that the defendant has voluntarily agreed to change its behavior does not lead to prevailing party status for the plaintiff. A plaintiff does not become a prevailing party if the court merely recognizes what the government has voluntarily agreed to and only "requir[es] [the government] to follow through with what [it] had already voluntarily promised to do." *Smith*, 401 F.3d at 27.

Fourth, it is also firmly the law that there must be a clear basis within the order (of October 12) for both the court's continuing jurisdiction and its power to enforce an agreement between the parties. *Kokkonen*, 511 U.S. at 381; *Saccoccia*, 433 F.3d at 28. In *F.A.C.*, we held that a court's order must expressly retain jurisdiction or expressly incorporate the terms of a settlement agreement to satisfy *Kokkonen*. A "bare reference to 'a settlement agreement' does not satisfy *Kokkonen*." *F.A.C.*, 449 F.3d at 190. That was not done here. *See also Smith*, 401 F.3d at 24 ("For an order to be considered the functional equivalent of a consent decree, . . . '[t]he obligation to comply with a settlement's terms must be *expressly* made part of a court's order for jurisdiction to enforce the settlement after dismissal of the action to exist.'" (quoting *Smyth*, 282 F.3d at 283 (emphasis added))); *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 431-32 (5th Cir. 2002) (holding a district court order that included a settlement order attached as an exhibit did not satisfy *Kokkonen* because "to make a settlement agreement part of a dismissal order by incorporation, *Kokkonen* requires a district court to clearly indicate its intention within the dismissal order itself by expressly incorporating the agreement's terms" and noting that "a number of our sister circuits have similarly interpreted *Kokkonen*").

Aronov makes a separate argument that a remand to the agency was necessary so that citizenship could be granted, and that this suffices to make him a prevailing party. We need not resolve the question of whether the agency could have acted without the remand,[14] as it does not matter to our resolution of the judicial imprimatur issue. The order remanding to the agency is alone not enough to establish the needed imprimatur. *See, e.g.*, *Rice Servs.*, 405 F.3d at 1025 (under the EAJA, securing a remand order alone is insufficient; the claimant must secure relief on the merits); *see also Envtl. Def. Fund, Inc. v. Reilly*, 1 F.3d 1254, 1257-58 (D.C. Cir. 1993) (same, applying Resource Conservation and Recovery Act). Aronov's argument is simply an effort to revive the "catalyst theory," which the Supreme Court has rejected.

B. Substantial Justification

Even if the court order in this case had the attributes of a consent decree, the remaining condition for an EAJA award has not been met. We also hold as a matter of law that the government has met its burden to show its pre-litigation actions or inactions[15] which led to this suit were substantially justified.

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[14] *Compare Etape v. Chertoff*, 497 F.3d 379, 383-87 (4th Cir. 2007) (holding that a district court has exclusive jurisdiction once a § 1447(b) suit is filed), *and United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir. 2004) (en banc) (same), *with Xie v. Mukasey*, 575 F. Supp. 2d 963, 964-65 (E.D. Wis. 2008) (holding that the court and USCIS have concurrent jurisdiction), *and Bustamante v. Chertoff*, 533 F. Supp. 2d 373, 376 (S.D.N.Y. 2008) (same).

[15] The parties agree that the government's post-litigation conduct was substantially justified.

An action is "substantially justified" if "it has a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n.2. The government's conduct must be "justified to a degree that could satisfy a reasonable person." *Id.* at 565; *see also Schock*, 254 F.3d at 5. The government need only have "a reasonable basis both in law and in fact for its position." *De Allende v. Baker*, 891 F.2d 7, 12 (1st Cir. 1989); *see also United States v. Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985).

Importantly, for EAJA purposes, the position of a government agency can be substantially justified even if a court ultimately determines the agency's reading of the law was not correct. *Pierce*, 487 U.S. at 566 n.2 ("[A] position can be justified even though it is not correct, and we believe it can be substantially . . . justified if a reasonable person could think it correct."). The government's position as to what the law requires may be substantially justified even if its interpretation of its legal obligations is not ultimately affirmed by a court. *Schock*, 254 F.3d at 5. In *De Allende*, we held that the district court abused its discretion in awarding attorneys' fees under the EAJA when the government was "at least reasonable" in denying a visa, even though the applicant's interpretation of the underlying law ultimately prevailed. *De Allende*, 891 F.2d at 12, 13; *see also Li v. Keisler*, 505 F.3d 913, 920 (9th Cir. 2007) (holding, under the EAJA, that "[i]n the absence of guidance from this court, the government's position was substantially justified"); *Trahan v. Brady*, 907 F.2d 1215, 1219-20 (D.C. Cir. 1990) (finding substantial justification where government acted in response to what it reasonably, though incorrectly, believed was its statutory obligation).

And of course, if the agency reasonably believes the action or inaction is required by law, then, by definition it

cannot be the basis for an award of EAJA fees. *See Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 41 (1st Cir. 2001) (the government's pre-litigation conduct of initiating a debarment procedure was substantially justified because it was required to do so by statute).

Aronov's argument rests on a fundamental misapprehension of what substantially justified means. His argument is addressed to why he thinks the agency is not legally "right" in its position and not to whether the USCIS position was substantially justified, a different question. The test is whether a reasonable person could think the agency position is correct. *Pierce*, 487 U.S. at 566 n.2. While we think the agency was "right" in how it handled the matter, the substantial justification analysis does not hinge on whether the agency was right or wrong but on whether its actions were reasonable.

Aronov concedes no case flatly held the law required the agency to adopt his position. Nonetheless, he argues the position was unreasonable because no statute mandates USCIS to use the backlogged FBI name check,[16]

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[16] In May 2008, USCIS had approximately 270,000 name check cases pending for all categories of applicants, and over 80% of the cases had been pending for more than 90 days. In April 2008, USCIS and the FBI announced a joint plan to eliminate the backlog in name check searches by refining the search process and increasing the amount of staff dedicated to conducting searches. *See* Citizenship and Immigration Services Ombudsman, *Annual Report 2008*, at 6-7, *available at* http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf. The number of pending name checks dropped to approximately 95,000 by August 2008. *See* Press Release, *Update on Pending FBI Name Checks and Projected Naturalization Processing Times*, http://www.dhs.gov/xnews/releases/pr_1220993097713.shtm. An amicus brief filed by the American Immigration Lawyers Association reported a study of cases filed in district courts in the First Circuit. It concluded that plaintiffs had filed 137 cases involving naturalization delay litigation in 2007.

and that § 1447(b) establishes a "statutory deadline" of 120 days after the interview to grant or deny citizenship, and so violation of the deadline means the government's position was not substantially justified.

The decision by the agency not to grant Aronov citizenship until his background check was completed, even if that exceeded 120 days, stemmed from two statutory mandates under which the agency must operate. First, 8 U.S.C. § 1446(a) provides that "[b]efore a person may be naturalized, an employee of [the USCIS] . . . shall conduct a personal investigation of the person applying for naturalization." Second, in a budgetary statute that has continuing effect, Congress provided that "none of the funds appropriated or otherwise made available to the [USCIS] shall be used to complete adjudication of an application for naturalization unless the [USCIS] has received confirmation from the [FBI] that a full criminal background check has been completed." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2448-49 (1997) [hereinafter 1997 Appropriations Act]. These are statutory commands the agency could not ignore.

Aronov's argument is that the phrase "confirmation from the [FBI] that a full criminal background check has been completed" did not require the USCIS or the FBI to include an FBI name check in that process. While it might have been reasonable, he argues, to require the FBI name check if it could have been completed within 120 days, it was not reasonable to do so if that name check requirement virtually guaranteed that the application process would take longer than 120 days to complete.

It is true that Congress did not define for the agency what a full criminal background check was. Congress chose to let the USCIS, with its particular expertise, decide the content of that "confirmation from the [FBI] [of] a full criminal background check." 1997 Appropriations Act, 111 Stat. at 2448-49. That delegation to USCIS is entirely sensible for a number of reasons, including the sometimes rapidly evolving law enforcement technologies. The USCIS decided in 2002 that the inclusion of FBI name checks provided better full criminal background investigations. It reached this conclusion after the terrorist attacks of September 11, 2001 and after it discovered that deficiencies in its previous screening process had resulted in the grant of naturalization to a man suspected of ties to the terrorist group Hezbollah. *See* S.S. Hsu & N.C. Aizenman, *FBI Name Check Cited in Naturalization Delays*, Wash. Post, June 17, 2007, at A1. Also, Congress used the word "full" criminal background check, which supports the choice of the commonly used FBI name checks.[17]

Further, Congress has since essentially endorsed the USCIS's choice to use FBI name checks as part of the required criminal background check when, in 2007 (after the delay in this case), it addressed the delays by appropriating $20 million to USCIS to "address backlogs of

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[17] The FBI provides name check information to dozens of federal, state, and foreign agencies "seeking background information from FBI files on individuals before bestowing a privilege—[w]hether that privilege is government employment or an appointment; a security clearance; attendance at a White House function; a Green card or naturalization; admission to the bar; or a visa for the privilege of visiting our homeland." *Foreign Travel to the United States: Testimony Before the H. Comm. on Gov't Reform* (July 10, 2003) (statement of Robert J. Garrity, Jr., Assistant Dir. (Acting), Records Mgmt. Div., FBI), *available at* 2003 WL 21608243.

security checks associated with pending applications and petitions" provided that the agency submitted a plan to eliminate the backlogs and ensure that the agency "has the information it needs to carry out its mission."[18] Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, div. E, tit. IV, 121 Stat. 1844, 2067 (Dec. 26, 2007).

Congress chose not to prohibit the use of the FBI name check, but rather provided funding to expedite the process USCIS had chosen. The agency's, and the FBI's, choices to use name checks were clearly within their legal authority and were reasonable. Principles of administrative law require that courts defer to reasonable interpretations by an agency on matters committed to the agency's expertise by Congress. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Global NAPS, Inc. v. Verizon New Eng., Inc.*, 505 F.3d 43, 47 (1st Cir. 2007). Agencies are also entitled to deference with respect to policy determinations. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v.*

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[18] Congress's appropriation also addresses amicus's policy argument that the fact that cases brought under § 1447(b), like Aronov's, have spurred the agency to speed up the name check process should lead us to award fees. While § 1447(b) claimants and their counsel may play a commendable role in bringing attention to the backlog problem, amicus's argument is relevant only to the catalyst theory. Further, the government had been aware of the backlog in security checks before the peak in litigation that amicus cites, *see, e.g.*, Citizenship and Immigration Services Ombudsman, *Annual Report 2004*, at 4-5, *available at* http://www.dhs.gov/xlibrary/assets/CISReport_to_Congress.pdf, and it responded by securing additional resources to address the problem, *see, e.g.*, *Oversight of the Federal Bureau of Investigation: Hearing before the S. Judiciary Comm.* (Sept. 17, 2008) (statement of Robert S. Mueller, III, Dir., FBI) ("[W]hen we had the backlog, [and] recognized it, we sought the funding, [and] received the funding to address the backlog.").

Sanders, 430 U.S. 99 (1977); *Global NAPS*, 505 F.3d at 47; *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997). Once the USCIS made that choice, it acted under the requirements of law—its own regulations—in awaiting the full background check. Aronov argues the agency was not permitted to make that choice because it was mandated by statute, § 1447(b), to complete all checks within 120 days.

In its briefing to this court, USCIS has taken the position that the statute does not impose a flat 120-day deadline to grant citizenship. The agency argues that the plain text of the statute says only that if the agency fails to make a determination of citizenship within the 120-day period after the interview, "the applicant may apply to the United States district court" for it to "determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter." 8 U.S.C. § 1447(b). The agency also supports its reading with a reference to the Congressional history. *See* 135 Cong. Rec. H4539, H4542-43, 1989 WL 182156 (daily ed. July 31, 1989) (legislative history of § 1447(b)'s 120-day provision) (discussing the importance of addressing delays but making no mention of a deadline on the agency).

If the statute is read literally, as the USCIS argues, the agency could reasonably believe it does not violate the statute by not acting within 120 days on the grounds that the statute does not command it to act within the deadline. *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) (holding that dismissal of government's forfeiture action for failure to follow statutory timing guidelines was unwarranted because "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal

courts will not in the ordinary course impose their own coercive sanction").

Aronov replies that even if the statute does not set a deadline of 120 days, the agency by regulation has. *See* 8 C.F.R. § 335.3(a) ("A decision to grant or deny the application shall be made at the time of the initial examination or within 120 days after the date of the initial examination of the applicant. . . ."). That regulation should, of course, be read in the context of the regulations defining when an initial determination may take place. Aronov was mistakenly given a premature initial examination. *See id.* § 335.2(b).

Even were the agency's views wrong as to the requirement for FBI name checks and as to whether the statute and/or regulation imposed a flat 120-day deadline, its views were still substantially justified. Neither the Supreme Court nor this court has ever held that FBI name checks are not required as part of full FBI background checks or that § 1447 imposes an absolute time limit for granting citizenship regardless of whether the name check is completed. At most, then, this is a situation in which an agency has imposed regulatory requirements on itself that are in tension, and the solution it chose, to bend the 120-day rule because the background check was not completed, is entirely reasonable.

Independently, the choice by USCIS to favor national security in requiring a full check of the background of a citizenship applicant over a self-imposed 120-day deadline, regardless of whether the interview was prematurely granted here, cannot be unreasonable. As the USCIS has stated:

> Although [FBI name checks] may require a more lengthy processing time, USCIS

> believes that performing them is essential to identifying national security and public safety concerns that would not have been uncovered by other means. This is particularly true given that in[ ] a few cases, the information obtained from the FBI through this process has reflected very significant issues and risks. FBI name checks disclose information to USCIS that is otherwise not available. . . . USCIS is committed to effective background checks, and thus is committed to the FBI name check.

USCIS, *Response to the Citizenship and Immigration Services Ombudsman's 2006 Report*, at 10, *available at* http://www.dhs.gov/xlibrary/assets/USCIS-Response-Ombudsman-06-Report-May-2007.pdf. It is not unreasonable for the agency to require greater certainty when deciding whether to grant citizenship. *See Alexander v. INS*, 74 F.3d 367, 370 (1st Cir. 1996) ("[T]he right in question—American citizenship—is one of the most precious imaginable.").

Indeed, the importance of the greater certainty that the name check provides is highlighted by the agency's choice in 2007 to address the backlog problem by distinguishing between applicants for residency and applicants for citizenship—USCIS grants residency to applicants if their cases were otherwise complete but their name checks remained pending over 180 days from the date of the initial request. *See* USCIS Interoffice Memorandum, *Revised National Security Adjudication and Reporting Requirements* (Feb. 4, 2008), *available at* http://www.uscis.gov/files/pressrelease/DOC017.PDF. The agency reasonably concluded that, if the name checks turned up

negative information about applicants, it could initiate removal proceedings against those granted residency while it would have much more difficulty proceeding against those granted citizenship. *See* S.S. Hsu, *U.S. to Skirt Green-Card Check*, Wash. Post, Feb. 12, 2008, at A3 (citing statement by USCIS spokesperson Christopher S. Bentley).

Aronov advances one more reason why, in his view, the agency had been unreasonable. He argues that the USCIS had created a system for giving priority to certain applicants, under which the agency would request the application be expedited if, for example, the applicant were facing military deployment. One of the official factors is whether the applicant has filed an action for mandamus.[19] Aronov says that this has created an incentive system which requires candidates to sue to get priority in having FBI name checks done, which unreasonably forces applicants to sue. As the USCIS points out, the logic of this argument is to impose EAJA fees on it in the numerous instances it has benefitted an applicant by giving priority to the applicant's name check.

The reasoning assumes there is some right in the applicant to priority, but there is no statutory right, given to Aronov or anyone else, to jump the queue. And the agency's choice to give priorities to the categories it selected was a rational allocation of resources,[20] which

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[19] The criteria for expediting are: "Military deployment must be imminent," "Age-out benefits," "Writ of Mandamus," "Immigration Judge cases—grant of lawful permanent residence," and "Compelling reasons as provided by the requesting office (i.e., critical medical condition) assessed on a case by case basis."

[20] Aronov and amicus argue that in an EAJA action, a court can never consider the resources of the agency on the question of whether the agency's actions were substantially justified. That is not

must be spent on litigation if the agency does not work out a voluntary solution.[21] For the same reasons, Aronov's argument that he should be given fees against the FBI if not the USCIS fails.

III.

The order awarding attorneys' fees is reversed and the application for fees is ordered dismissed with prejudice.

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so. Aronov and amicus wrongly rely on the Court's statement in *Commissioner, INS v. Jean*, 496 U.S. 154 (1990), that under the EAJA, "[t]he Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights." *Id.* at 164-65 (footnote omitted). This statement addresses only the argument, which the government does not make here, that the agency's need for resources should outweigh a successful applicant's right to an award. It is simply irrelevant to the separate issue of whether the government's prelitigation position was substantially justified. A court can, and should, take into account the resources that an agency has to meet its statutory commands and to proceed in fairness to all applicants in light of the constraints under which it operates. The EAJA was meant to allow plaintiffs to challenge "unjustified governmental action"; the state of an agency's resources is material to whether its choice was or was not justified. Here, the agency was justified in acting as it did in light of its resources.

[21] In *Al-Maleki*, the Tenth Circuit found the government's prelitigation conduct not substantially justified. There, the issue was defined as whether the USCIS had unreasonably rejected petitioner's informal efforts to resolve the matter and failed, after the 120-day period, to request an expedited FBI name check. The only justification presented by the government, unlike this case, was that it was unable, at that point, to request expedition. The circuit court found this was factually untrue. It also held "[b]ecause USCIS ha[d] not offered any other justification for its prelitigation actions," *Al-Maleki*, 558 F.3d 1200, 1205, there was no abuse of discretion. Thus, that court was not faced with the justifications offered to us.

TORRUELLA, Circuit Judge, dissenting.

This appeal presents a recurring example of what appears to be this Court's varying standards when judging governmental power as compared to those that apply to citizen challenges to government authority.

I join Judge Lipez's dissent, which carefully explains how the government failed to comply with its own regulations and deadlines, thereby unreasonably forcing Aronov to sue to obtain relief. I write separately only to lament the double standard we apply. It is with monotonous regularity that we dispatch claims of immigration petitioners who have failed to meet one filing deadline or another.[1] That outcome is sometimes dictated by law. Yet, when a successful plaintiff attempts to get relief provided by the law by seeking $4,270.94 in attorney's fees incurred while forcing the government to adjudicate his much-delayed application, this Court uses exceptional en banc procedures to reverse the award.[2] Even established rules do not seem to influence this Court when it seeks to expand government power or shield federal agencies from the consequences of their own failings. Instead, this Court adopts amorphous policy interests alleged by the government through bombastic exaggera-

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[1] *See, e.g.*, *Chedad v. Gonzales*, 497 F.3d 57, 66 (1st Cir. 2007) (rejecting an immigrant's claim to adjustment of status by refusing to toll the time period for voluntary departure while a motion to reopen was pending), *overruled* by *Dada v. Mukasey*, 128 S. Ct. 2307 (2008); *Sharari v. Gonzales*, 407 F.3d 467, 473 (1st Cir. 2005) (explaining limitation on judicial review of BIA determinations regarding timeliness of asylum applications); *Zhang v. INS*, 348 F.3d 289, 292 (1st Cir. 2003) (explaining the strict jurisdictional timing requirements on appeals of asylum applications and limitation on tolling).

[2] *See also United States v. Vega-Santiago*, 519 F.3d 1, 7 (1st Cir. 2008) (en banc) (Torruella, J., dissenting).

tion and doomsday predictions in its en banc petition. *See* Majority Opinion at p. 86 (citing USCIS's argument that the panel opinion would have "dangerous systematic consequences far beyond this case" and would be an "'enormous disincentive for the agency to settle these cases'").

On the issue of whether Aronov was a prevailing party, the majority ignores our sensible precedent that we defer to a district court on the meaning of its own orders. *See New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 19 (1st Cir. 2002) (affirming a denial of attorney's fees against Massport). The majority then proceeds to resolve the issue without itself bothering to decide the jurisdictional effect of the district court's order. In other words, the majority adopts the government's position on imprimatur without deciding whether USCIS was free to act without the district court's explicit approval of the parties' proposed course of action. The majority concludes that even assuming the district court's order constituted a transfer of its exclusive jurisdiction back to USCIS, the district court's decision was not a consideration of the merits. This conclusion replaces the district court's own explanation of its order with an assumption that the district court exercised its power to remand without consideration. Such a conclusion is unfair to our district courts and is not even supported by the precedent on which the majority relies. *See Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1025 (Fed. Cir. 2005) (stating that, depending on the context and effect of the order, a remand to an administrative agency can constitute prevailing on the merits). Here, where the remand order effectively mandated the relief Aronov sought and changed the jurisdictional landscape such

that that relief could be awarded, the majority must strain to avoid seeing judicial imprimatur.[3]

Similarly, in supporting its ruling for the government on this issue, the majority effectively says that district courts do not have authority to sanction parties that fail to comply when the court allows a clear and unambiguous motion seeking to compel some specific action. This extension of the rule that formal injunctions must not incorporate other documents by reference, see Fed. R. Civ. P. 65(d), seems to me to be both questionable and cumbersome. Nonetheless, the majority unhesitatingly adopts it to support the government's position.

Finally, on the issue of substantial justification, the majority again reaches to support the government's position. Though the agency's own regulation spells out a clear rule—decisions must be made within 120 days of the initial examination—the majority calls the agency's violation of its own rule reasonable. Specifically, to avoid granting Aronov relief, the majority relies on the gov-

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[3] In this regard, I see the Tenth Circuit's recent decision as indistinguishable from the present case on the prevailing party issue. *See Al-Maleki v. Holder*, 558 F.3d 1200 (10th Cir. 2009). The majority simultaneously admits that the decision may be contrary to its view while attempting to distinguish it on the thinnest of grounds. That the remand order in that case was slightly more detailed and that more litigation had transpired before the remand order cannot be sufficient to distinguish *Al-Maleki*. *Id.* at 1205. These differences in formatting are not relevant to the effect and force of the remand order or to the Tenth Circuit's conclusion that the government's catalyst arguments were unconvincing. *Id.* Rather the functional posture of both cases is the same: the district court agreed with the parties' joint request for remand for the purpose of allowing the plaintiff's application. Thus, the majority adoption of the government's position that *Al-Maleki* is distinguishable is strained, elevates form over function, and effectively does create a circuit split.

ernment's attenuated insinuations that our national security will be threatened by ruling against it. But Aronov's modest request for attorney's fees does not seek to prevent the government from performing background checks. Rather he seeks only to recover the costs he was forced to incur to obtain adjudication of his petition after an excessive delay attributable to backlog and a failure to follow protocol. Only through acquiescence to the government's policy suggestions can the majority conclude that it would be unreasonable to expect USCIS to conduct the necessary background checks while complying with its own timing regulations.

With due respect, I suggest that our jurisprudence would better reflect the time-honored motto, "Equal justice under law,"[4] if we showed the same doctrinal flexibility and credulity to policy arguments presented by citizens asking us to limit governmental power, or for compensation for harm caused by governmental error, as shown by the majority to the government in this appeal. For these reasons, and the reasons stated by Judge Lipez, I respectfully dissent.

LIPEZ, Circuit Judge, with whom TORRUELLA, Circuit Judge, joins, dissenting.

I respectfully dissent from the decision of the majority narrowing the class of plaintiffs who can obtain attorney's fees under the Equal Access to Justice Act ("EAJA"). With its strangely dismissive view of a decision of the district court explaining why Aronov is a prevailing party, the majority refuses to accord that status to an immigrant who, facing a substantial delay in the processing of his application for naturalization, exercised

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[4] As appears engraved on the building housing the Supreme Court of the United States.

his statutory right to sue the U.S. Citizenship and Immigration Service ("USCIS") and obtained an order from the district court remanding the matter to USCIS so that he could be made a citizen. Invoking national security concerns that are not implicated here, the majority characterizes as substantially justified the conduct of USCIS, whose delay in processing the naturalization application was both contrary to statute and to its own regulations. These legal conclusions are unwarranted, unwise, and contrary to the purpose and promise of the EAJA.

I.

The facts of this case are straightforward. Aronov applied for naturalization with the Vermont Service Center of USCIS on May 22, 2004. On February 14, 2005, USCIS conducted an initial examination of Aronov regarding his application. As the government acknowledges, the agency's interview with Aronov was premature. USCIS's own regulation dictates that an initial examination should be undertaken only after an applicant's full background check has been completed. 8 C.F.R. § 335.2(b). After Aronov was interviewed, federal law required USCIS to adjudicate his application within 120 days. *See* 8 U.S.C. § 1447(b); 8 C.F.R. § 335.3(a). Aronov heard nothing from USCIS for over a year. He made repeated inquiries about the status of his application. On March 23, 2006, 402 days after his examination, Aronov received a letter from the agency requesting six months more to complete additional review. At that time, Aronov's statutory right to sue USCIS in federal district court to compel action on his application had already accrued. *See* 8 U.S.C. § 1447(b). On August 28, 2006, 560 days after his initial examination, and 440 days past US-

CIS's deadline for adjudicating the application, Aronov filed suit.

Thirty-nine days later, the background check was complete. On October 6, 2006, the government and Aronov filed a Joint Motion for Remand Pursuant to 8 U.S.C. § 1447(b). In full, the joint motion read:

> Pursuant to 8 U.S.C. § 1447(b), the parties in this action, plaintiff . . . and defendants Michael Chertoff, Secretary of the United States Department of Homeland Security, et al., hereby jointly move this Honorable Court to remand this matter to the USCIS, so that [it] can grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006. In support of this motion, the parties state as follows:
>
> 1. On or about August 28, 2006, plaintiff Alexandre Aronov filed this action.
>
> 2. Since that date, USCIS has completed its review of plaintiff's application for naturalization and, if jurisdiction is returned to the agency, would grant the application and schedule plaintiff's oath ceremony for no later than November 8, 2006.
>
> 3. The governing statute, 8 U.S.C. § 1447(b), provides that, in cases in which the agency has failed to render a decision on an application for naturalization within 120 days of the examination of the applicant, the applicant may file suit in district court requesting to adjudicate the application and "[s]uch court has jurisdiction over

> the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter."
>
> Wherefore, with good cause having been shown, the parties respectfully request that this Court remand this matter to USCIS so that it can grant plaintiff's application for naturalization and schedule plaintiff for an oath ceremony for no later than November 8, 2006.

On October 12, 2006, the court entered an electronic order granting the motion and the remand. The docket text for the remand order states: "Judge Nancy Gertner: Electronic ORDER entered granting 3 Joint Motion to Remand to U.S. Citizenship and Immigration Services."[1]

On November 28, 2006, Aronov filed an application for attorney's fees pursuant to the EAJA.[2] The gov-

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[1] The "3" references the docket number of the joint motion and was hyperlinked to the joint motion's text.

[2] The EAJA provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

ernment opposed Aronov's application, asserting that he was not a prevailing party in the litigation under the test established in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), and that the government's position regarding his application was substantially justified. The district court agreed with Aronov and ordered the government to pay him $4,270.94 in attorney's fees and costs. In its order, the district court explained the significance of its October 12 remand order, stating, "the government here was granted not a dismissal, but a remand to the agency conditional on the granting of plaintiff's naturalization by November 8, 2006. Had the naturalization not so occurred, the parties might very well be back in front of this Court litigating a contempt action." *Aronov v. Chertoff*, No. 06-11526, 2007 U.S. Dist. LEXIS 40455, at *5 (D. Mass. Jan. 30, 2007) (emphasis in original). A timely appeal by the government followed. A panel of the court affirmed the award. *Aronov v. Chertoff*, 536 F.3d 30 (1st Cir. 2008). Subsequently, a majority of the en banc court granted the government's petition for rehearing en banc, vacating the panel opinion.

II.

Although parties are ordinarily required, win or lose, to bear their own attorney's fees, *see, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), a number of exceptions to this default rule have been adopted by statute. One such exception, the EAJA, authorizes an award of attorney's fees and costs to a litigant who has brought a civil suit against the United States if (1) she is the prevailing party in the matter; (2) the government fails to show that its position was substantially justified; and (3) no special circumstances would make such an award unjust. 28 U.S.C.

§ 2412(d)(1)(A); *see also Schock v. United States*, 254 F.3d 1, 4 (1st Cir. 2001). By offering qualifying litigants attorney's fees and other expenses, the EAJA seeks "to remove economic deterrents to parties who seek review of unreasonable government action." *Schock*, 254 F.3d at 4.

The court reviews the district court's decision to grant or deny a fee application under the EAJA for abuse of discretion, *id.*, "mindful that the district court has an 'intimate knowledge of the nuances of the underlying case,'" *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (quoting *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 292 (1st Cir. 2001)). "Such deference is particularly appropriate where, as here, the correctness of the court's decision depends in large part on the proper characterization of its own statements." *Id.*

A. Prevailing Party

The Supreme Court has long held that a plaintiff who obtains a "settlement agreement[ ] enforced through a consent decree" is a "prevailing party." *See Buckhannon*, 532 U.S. at 604 (citing *Maher v. Gagne*, 448 U.S. 122 (1980)). In cases following *Buckhannon*, most courts have also permitted fees where the plaintiff obtains an order equivalent to a consent decree. *See Roberson v. Giuliani*, 346 F.3d 75, 81-82 (2d Cir. 2003) (noting the agreement of a majority of appellate courts). For example, the Fourth Circuit held that orders lacking the title "consent decree" support an award if they are "functionally a consent decree," *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002), a formulation we have also employed. *See Smith v. Fitchburg Pub. Schs.*, 401 F.3d 16, 24 (1st Cir. 2005); *see also Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1025 (Fed. Cir. 2005)

(court action "equivalent" to a consent decree or judgment on the merits); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003) (settlements "sufficiently analogous" to consent decrees).

Given the posture of the underlying litigation, the question in this case is whether the district court's remand order is functionally equivalent to a consent decree. If the order is functionally equivalent to a consent decree, then a fortiori it possesses whatever "judicial imprimatur" a consent decree possesses, *see Buckhannon*, 532 U.S. at 605, and the order makes Aronov a prevailing party. According to the majority, "three related factors" must characterize an order that is the functional equivalent of a consent decree. First, there must be a "court-ordered" change in the legal relationship resulting from the underlying litigation. Second, "there must be judicial approval of the relief vis-a-vis the merits of the case." Third, there must be "judicial oversight and ability to enforce the obligations imposed on the parties." These factors must all be present if a court order is to constitute the functional equivalent of a consent decree. According to the majority, none of the factors was present here.

The majority is wrong. All three factors were present here. The change in legal relationship between USCIS and Aronov was court-ordered. The court satisfied the requirements for approval of a consent decree, which do not require the court to state explicitly that it has approved the relief in relation to the merits of the case. Lastly, the court retained jurisdiction to enforce the agreement by incorporating the terms of the joint motion into the remand order.

1. The change in legal relationship was court-ordered

During the litigation, only the district court possessed the authority to give Aronov the relief he requested. After Aronov filed suit, USCIS lost jurisdiction to adjudicate his application, thereby precluding USCIS from naturalizing Aronov without further court involvement. 8 U.S.C. § 1447(b) ("Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the [USCIS] to determine the matter."); *see Etape v. Chertoff*, 497 F.3d 379, 384-85 (4th Cir. 2007). The parties acknowledged this jurisdictional point in their joint motion for remand to the district court, which highlights the terms of 8 U.S.C. § 1447(b).[3] They understood that there

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[3] Elsewhere parties have litigated the question of whether the court maintains exclusive jurisdiction or, alternatively, concurrent jurisdiction with the USCIS. Most courts have held that the district court has exclusive jurisdiction over the application until it has acted pursuant to the statute. *See, e.g.*, *Etape*, 497 F.3d at 384-85 (holding that section 1447(b) vests the district court with exclusive jurisdiction over a naturalization application); *United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir. 2004) (en banc) (same). But *see, e.g.*, *Bustamante v. Chertoff*, 533 F. Supp. 2d 373, 381 (S.D.N.Y. 2008) (reaching the opposite conclusion). In its initial argument to us, the government did not suggest that USCIS maintained jurisdiction over Aronov's application after he filed suit in district court. In the en banc proceedings, the government alluded to the concurrent jurisdiction argument. Whatever the government's intent with the allusion, it is beside the point. The government's conduct of the litigation reflected its view that it could not act on Aronov's naturalization application without a remand order from the district court. Moreover, as the Tenth Circuit recently pointed out in *Al-Maleki v. Holder*, 558 F.3d 1200, 1205 (10th Cir. 2009), even if USCIS did retain concurrent jurisdiction over the application after the suit was filed, "the district court resolved the litigation before USCIS could voluntarily naturalize [the applicant]." *Id.* (emphasis in original).

had to be an intervening judicial order before Aronov could obtain relief. Nothing about this order was automatic; the district court had the discretion to either determine the naturalization issue itself or remand to USCIS with instructions.

This is not the catalyst scenario of *Buckhannon*. There, the plaintiff alleged that West Virginia law conflicted with federal law, 532 U.S. at 601, and the West Virginia legislature retained its authority throughout the litigation to "unilateral[ly]" amend its laws. *See Smyth*, 282 F.3d at 278 (using this expression). It exercised that authority and rendered the suit moot, after which the government moved to dismiss the case. Here USCIS could do no such thing. It lacked the authority to "unilaterally" provide Aronov the relief he requested. The district court's order was necessary to return authority to the agency.[4]

Moreover, the remand order mandated a change in the legal relationship of the parties—namely, that Aro-

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This order of events distinguishes *Buckhannon* regardless of the jurisdictional question.

[4] Contrary to the majority's suggestion, the fact that USCIS acted voluntarily in coming to an agreement with Aronov does not make Aronov ineligible for fees. Voluntary conduct by a defendant is a necessary part of any consent decree process. Indeed, as the Supreme Court has said, "the voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 521-22 (1986). Yet a plaintiff who obtains a consent decree is eligible for fees. *Maher*, 448 U.S. at 129-30. Similarly, awarding Aronov fees because the remand order is functionally equivalent to a consent decree would not conflict with our holding in *Smith*. *See Smith*, 401 F.3d at 26-27 (noting the defendant's voluntary conduct). The *Smith* panel expressly set aside as waived the question of whether the order there was functionally equivalent to a consent decree. *Id.* at 24.

nov's status change from alien to citizen through an oath ceremony that would take place no later than November 8, 2006. According to the court, it "remanded specifically 'so that USCIS can grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006.'" *Aronov*, 2007 U.S. Dist. LEXIS 40455, at *4 (quoting Joint Mot. to Remand). There is no mistaking the district court's meaning here. Its remand order incorporated by reference the joint motion of the parties and thereby ordered USCIS to fulfill the promise that it made to Aronov and the court in the joint motion. This was the district court's own understanding of its order. *See id.* at *4-5.

A district court is in the best position to explain the meaning of its own order. We defer routinely to the district court's view of the significance of its remand order. *See Kinton*, 284 F.3d at 30 ("Clearly, the district court is in the best position to determine whether its statements . . . should be considered as the functional equivalent of a judicial order within the meaning of *Buckhannon*."); *Harvey v. Johanns*, 494 F.3d 237, 242 (1st Cir. 2007) ("We must, of course, accord deference to the district court's interpretation of the wording of its own order."); *see also Lefkowitz v. Fair*, 816 F.2d 17, 22 (1st Cir. 1987) ("[U]ncertainty as to the meaning and intendment of a district court order can sometimes best be dispelled by deference to the views of the writing judge.").

Here, the majority dismisses the district court's assessment of its October 12 remand order in its subsequent decision on attorney's fees as a "post-hoc explanation for a prior order." If the majority means that the district court's explanation is meaningless because the court could not incorporate by reference the terms of the joint motion into the remand order as a matter of law,

then it is incorrect. Whether a court has incorporated an agreement into an order depends on context. In *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185 (1st Cir. 2006), we held that an oral settlement agreement between two parties to a complex RICO dispute was not incorporated into a dismissal order that referred to it. *Id.* at 190. However, we expressly limited our rejection of the incorporation claim to "the present case," noting, "[h]ard and fast rules may be unwise because of variations in language and context."[5] *Id.*

This is a sensible approach. District courts routinely enter orders granting a party's motion without elaboration. The idea that such an order cannot incorporate by reference the terms of the motion to which the order responds is at odds with the daily practice of the courts. To be sure, incorporation by reference may be inappropriate for the entry of a consent decree that addresses a complex lawsuit with many issues and multiple parties. But this is not remotely such a case. The relief Aronov sought was straightforward: "[a]djudicating [his] Application for Naturalization . . . or, in the alternative,

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[5] In *F.A.C.*, we discussed the importance of context to the incorporation of a settlement agreement into a dismissal order. *F.A.C.*, 449 F.3d at 190. Here we are dealing with a remand order. If anything, the case for incorporating by reference the terms of a preceding motion into a remand order is stronger than the case for incorporating by reference the terms of a settlement agreement into a dismissal order. Remand, unlike dismissal, expressly contemplates an ongoing adjudication of a case by a lower court or administrative agency, pursuant to the order of the remanding court. *See Black's Law Dictionary* (8th ed. 2004). Remanding courts intend, and the parties expect, the remand order to instruct the lower court or agency about what further proceedings should take place, and orders often accomplish this by incorporation—e.g., "We remand for proceedings consistent with this opinion."

[r]equiring [USCIS] to adjudicate [his] application for naturalization." Only two parties were involved. The terms of their joint motion were clear. There was no impediment, legal or practical, to the incorporation of that joint motion into the district court's remand order.

One cannot examine the record below and conclude—against the district court's interpretation of its own remand order—that the court did not refer to the joint motion with the intent of incorporating its terms, and with the full expectation that the promises made therein would be fulfilled. The parties' joint motion makes specific representations to the court about the action the defendant would take. The court's order refers to the joint motion twice, once by name and once by docket number. USCIS could only understand that the court was ordering it to carry out the promise made to the court. USCIS would naturalize Aronov by November 8, 2006, and thereby change his status from alien to citizen.

2. The court satisfied the requirements for entering a consent decree

The majority contends that a district court must "appraise," "weigh" or "evaluate" the merits of a case in relation to the relief provided by the consent decree. The requirements for entering a consent decree were recently summarized by the Supreme Court in *Frew ex rel. Frew v. Hawkins*:

> Consent decrees entered in federal court must be directed to protecting federal interests. In [*Local No. 93*], we observed that a federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the

> case made by the pleadings; and must further the objectives of the law upon which the complaint was based.

540 U.S. 431, 437 (2004) (citing *Local No. 93*, 478 U.S. at 525 (collecting cases)); *see also Conservation Law Found. of New Eng., Inc. v. Franklin*, 989 F.2d 54, 59 (1st Cir. 1993) (listing same requirements). We have also held that district courts must determine that a proposed consent decree is fair, adequate and reasonable before entering it. For example, in *Conservation Law Foundation*, we wrote, "[d]istrict courts must review a consent decree to ensure that it is 'fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; [and] that it is consistent with the objectives of Congress. . . .'" 989 F.2d at 58 (quoting *Durrett v. Housing Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990)); *see also United States v. City of Miami*, 664 F.2d 435, 441 (Former 5th Cir. 1981).

We agree that it would be difficult for a district court to determine the fairness, reasonableness and adequacy of a proposed agreement without making some evaluation of the merits of the case in relation to the relief provided by the consent decree. However, "how deeply the judge must inquire, what factors he must take into account, and what weight he should give the settling parties' desires will vary with the circumstances." *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1985); *see also United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1088 (1st Cir. 1994) (holding that the substance of the fairness inquiry will depend on the context). Moreover, neither *Frew* nor *Conservation Law Foundation* require that a judge explicitly state, in the court's order or elsewhere on the record, that she has determined that a proposed agreement meets these requirements. *See*

Frew, 540 U.S. at 437; *Conservation Law Found.*, 989 F.2d at 58 (holding that a court must "review" a proposed consent decree). As a reviewing court, we assume that a judge understands the role the district court is supposed to play in deciding whether to enter a consent decree, and that the judge acts in accordance with that understanding. As we explained previously regarding this very issue,

> the question is whether the record contains adequate facts to support the decision of the district court to approve the proposed compromise. As to this, as the Supreme Court has observed, "a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based."

United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 437 (1968)).

Here, the record "contain[s] adequate facts to support the decision of the trial court to approve the proposed compromise[ ]." *TMT Trailer Ferry*, 390 U.S. at 437. Again, the context is simple. There is one plaintiff, one government agency, and a specific form of relief that is being sought. The judge had the benefit of both the complaint and the parties' joint motion for remand. The complaint identified the factual and legal bases for providing relief. The joint motion isolated the relevant facts and law, and asserted "good cause" for remanding to the agency for naturalization. From these documents, the district court could readily evaluate the merits of Aronov's claim in relation to the relief described in the joint

motion, and determine that the jointly proposed agreement was "fair, adequate, and reasonable."[6] The court also could determine that it met the requirements imposed by *Frew*. In short, the record contains adequate facts to support the court's decision to approve the proposed agreement and incorporate it in an order of the court, and there is no reason to assume, as the majority apparently does, that the court failed to make the necessary determination.

3. The court retained jurisdiction to enforce the agreement

The majority argues that the district court's order "did not contain provisions for future enforcement typical of consent decrees." But a consent decree need not contain a separate provision explicitly retaining jurisdiction for future enforcement. We have held that if the terms of an agreement are incorporated into an order, the district court retains jurisdiction to enforce that agreement. *Smith*, 401 F.3d at 24 ("'Either incorporation of the terms of the agreement or a separate provision

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[6] There is no legal support for the majority's contention that a defendant must file an answer or "raise defenses" before a consent decree (or its equivalent) may be entered by a federal court. Consent decrees may be entered at any stage of litigation, and are regularly entered before a defendant has filed an answer. *See* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 913 (noting that parties often negotiate consent decrees before the complaint is filed, and that during the period of study nearly one-third of Title VII consent decrees involving the Department of Justice and public employers were entered the day the complaint was filed). Here, in contrast, both parties filed documents with the court. The joint character of the motion for remand provided the court a reasonable basis for evaluating the merits of the case.

retaining jurisdiction over the agreement will suffice [to retain jurisdiction to enforce the agreement].'" (quoting *Smyth*, 282 F.3d at 283)); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (stating this proposition for dismissal orders).[7] Here, the district court incorporated by reference the terms of the joint motion. This incorporation was sufficient to retain jurisdiction for purposes of future enforcement.[8]

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[7] The majority's statement that "it is also firmly the law that there must be a clear basis within the order . . . for both the court's continuing jurisdiction and its power to enforce an agreement between the parties" demonstrates its refusal to accept *Smith*, which states that incorporation of a settlement agreement in an order is sufficient for purposes of retaining jurisdiction to enforce that agreement. *Smith*, 401 F.3d at 24. We have also said that "hard and fast rules may be unwise [on the question of incorporation] because of variations in language and context." *F.A.C.*, 449 F.3d at 190; see supra section II(A)(1). The only authority the majority cites in support of its view, *Kokkonen*, does not support it. Indeed, the language "clear basis within the order" appears nowhere in *Kokkonen*. *See Kokkonen*, 511 U.S. at 379-82. In fact, as several courts have noted, *Kokkonen* is silent on whether reference suffices to incorporate an agreement for purposes of retaining jurisdiction. *See, e.g., Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 431-32 (5th Cir. 2002) ("[T]he Kokkonen Court did not explicitly hold that a district court's order of dismissal must contain an express statement incorporating a settlement agreement in order to vest the court with ancillary jurisdiction. . . ."); *Lucille v. City of Chicago*, 31 F.3d 546, 549 (7th Cir. 1994) (Cudahy, J., concurring).

[8] To determine whether the remand order was the functional equivalent of a consent decree, I need not decide whether the remand order itself satisfied the procedural requirements necessary for injunctions or to support a motion for contempt. *See* Fed. R. Civ. P. 65(d) (discussing form of order); *United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005) (requiring terms to be clear and unambiguous). The crucial question, as the majority acknowledges, is whether the district court retained jurisdiction over the agreement. The remand order did this by incorporating the terms of the joint

4. The district court's order was the functional equivalent of a consent decree

In summary, the change in legal relationship between USCIS and Aronov was mandated by the remand order that incorporated USCIS's representation that it would naturalize Aronov by a certain date. The law does not require that the district court state explicitly that it has evaluated the fairness, reasonableness, and adequacy of a proposed consent decree. It is enough if the record would permit the district court to make that evaluation. The record in this simple case is ample for that purpose. By incorporating the parties' joint motion, the remand order provided a continuing basis for enforcing the agreement if USCIS did not comply with its representations to the court. Thus, the court's remand order was

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motion by reference. Given this circumstance, if USCIS had failed to comply with the remand order, Aronov could have asked the court to issue an injunction confirming the naturalization obligation of USCIS and ordering compliance with it. Courts routinely issue supplemental orders to enforce a consent decree as a prelude to the invocation of contempt authority. *See, e.g.*, *King v. Greenblatt*, 127 F.3d 190, 192 n.5 (1st Cir. 1997) (describing the district court's issuance of injunctions "to implement the thrust of the earlier consent decree"). The majority fails to recognize the distinction between consent decrees and injunctions. It suggests wrongly that I have characterized the district court "as having essentially issued an injunction." That is not so. I have concluded that the district court entered the functional equivalent of a consent decree. There are key differences between consent decrees and injunctions—the viability of incorporation by reference being a principal one. The majority appears to believe that any order that does not meet the heightened standards applicable to injunctions and the contempt sanction "does not order [the parties] to do anything" and leaves the issuing court powerless to enforce the order. Such a conclusion belies the law and common sense.

the functional equivalent of a consent decree, and Aronov was a prevailing party.[9]

B. Substantial Justification

In addressing the "substantial justification" issue, the majority announces a broad rule to protect USCIS's authority to make policy choices favoring national security interests. As I will explain, no such authority is at issue. The question is much narrower: whether the delay in this case was substantially justified, in light of the fact that USCIS exceeded both the statutory and regulatory deadlines governing the naturalization process.

The government bears the burden of demonstrating that its position was substantially justified. *Schock v. United States*, 254 F.3d 1, 5 (1st Cir. 2001). The Supreme Court has interpreted the "substantially justified" language in the EAJA to require reasonableness: "[A]s be-

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[9] The Tenth Circuit's recent decision in *Al-Maleki*, 2009 WL 692612, at *2-3, affirmed an award of attorney's fees under EAJA to a naturalization applicant who had filed suit under section 1447(b) after there was a substantial delay in the adjudication of his application. The court's prevailing party analysis is strongly supportive of my analysis here. As I have already noted, *supra* note 4, the court distinguished *Buckhannon* on the grounds that the district court had resolved the litigation in favor of the applicant before USCIS naturalized him. *Id.* at *3. Moreover, the applicant, like Aronov, had submitted a joint motion with USCIS representing to the court that USCIS would naturalize him by a certain date. *Id.* The Tenth Circuit noted that the court's order was "bas[ed] . . . [on] the parties' stipulations" in the joint motion, and that the order was judicially enforceable against USCIS if the agency failed to comply. *Id.* Entry of such an order, the Tenth Circuit said, "not USCIS's stipulation, was the action which indelibly alter[ed] the legal landscape between USCIS and [the applicant]." *Id.* (internal quotation marks and citation omitted). This order sufficed to make the applicant a prevailing party.

tween the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see also Schock*, 254 F.3d at 5; *Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 40-41 (1st Cir. 2001). Thus, the key question is whether the government's position has "a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n.2.

The majority argues that the government's prelitigation position insisting on compliance with the name check policy is substantially justified because it "stemmed from two statutory mandates under which it must operate," and because that policy has since been endorsed by Congress. The first statute, 8 U.S.C. § 1446(a), provides that "[b]efore a person may be naturalized, an employee of the [USCIS], or of the United States designated by the Attorney General, shall conduct a personal investigation of the person applying for naturalization." The second mandate cited by the majority, the 1998 Appropriations Act, states: "During fiscal year 1998 and each fiscal year thereafter, none of the funds appropriated or otherwise made available to [USCIS] shall be used to complete adjudication of an application for naturalization unless [USCIS] has received confirmation from the Federal Bureau of Investigation that a full criminal background check has been completed. . . ." Depts. of Commerce, Justice & State, The Judiciary & Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2448-49 (1997) (8 U.S.C. § 1446 note). The majority also suggests that "Congress has since essentially endorsed USCIS's choice to use FBI name checks . . . by appropriating $20 million to

USCIS to 'address backlogs. . . .'" *See* Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007).

Relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, (1984), the majority asserts that the court must defer to USCIS's decision to employ the NNCP check because in these statutes Congress has committed decision-making authority to the agency on these issues. The agency has concluded, it says, that the comprehensive FBI name checks are "essential" to the background investigations. Although a small percentage of name checks take a considerable amount of time to complete, isolated delays should not prevent the government from maintaining the name check requirement as its policy.

This argument misconstrues what is at stake in this case. There is no challenge to the authority of USCIS to adopt the name check program as a policy. What is challenged is the application of that policy in this instance. Even if USCIS is entitled to invoke *Chevron* to defend its use generally of the FBI name check process, *see generally* Cass Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006) (analyzing the standards for determining whether an agency interpretation is entitled to evaluation under the *Chevron* framework), deference to the general policy does not imply that the government was substantially justified in its dilatory handling of Aronov's naturalization application.

The government's 440-day delay in acting on Aronov's naturalization application exceeded the deadline imposed by section 1447(b), which gives a district court jurisdiction to entertain a lawsuit by the applicant and evaluate a naturalization application if the agency has failed to adjudicate the application within 120 days after

conducting its initial examination. *See Etape*, 497 F.3d at 385; *see also Hovsepian*, 359 F.3d at 1163 ("A central purpose of [section 1447(b)] was to reduce the waiting time for naturalization applicants." (citing H.R. Rep. No. 101-187, at 8 (1989); 135 Cong. Rec. H4539-02, H4542 (1989) (statement of Rep. Morrison))). Both the courts and the agency itself have interpreted section 1447(b) as imposing a 120-day deadline for agency action. *See, e.g.*, *Al-Maleki*, 558 F.3d 1200 (treating statute as imposing a deadline); *Hovsepian*, 359 F.3d at 1161; 8 C.F.R. § 335.3(a) ("A decision to grant or deny the application *shall be made* at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization . . . .") (emphasis added); *see also Walji v. Gonzales*, 500 F.3d 432, 439 (5th Cir. 2007) ("[B]ecause the clear intent of Congress was to accelerate naturalization applications, and the statutory and regulatory language gives a definite time frame for decision once an examination has occurred, [§ 1447] is violated in situations [where the 120-day deadline is not met].").

The majority's contention that the statute does not command USCIS to act within the deadline is untenable. Although the majority acknowledges that the agency has adopted a regulation, 8 C.F.R. § 335.3(a), that treats the 120-day time frame as a deadline, the majority regards the statutory and regulatory frame as merely aspirational, with no consequences for the agency if it fails to comply.[10] If Congress had taken such a related view of its

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[10] The majority also contends that USCIS "could reasonably believe it does not violate the statute by not acting within 120 days on the grounds that the statute does not command it to act within the deadline." The agency's own regulations belie this claim. As noted, part 335.3(a) expressly treats the 120-day time frame as a deadline.

120-day time frame, it would not have explicitly provided that an applicant whose naturalization application remains unresolved at the end of the 120-day period may file suit in federal court to have the application either adjudicated by the court or remanded to the agency with instructions to adjudicate it. *See, e.g.*, *Etape*, 497 F.3d at 384-85 (concluding that after an applicant has filed suit with the district court pursuant to § 1447(b), the court has exclusive jurisdiction over the application).[11]

Moreover, as a matter of policy, if the naturalization applicant goes to the trouble of filing a law-suit seeking mandamus on the basis that the 120-day deadline has expired, the agency will capitulate and expedite the FBI name check request. According to a document entitled "FBI Name Check Expedite Criteria," which Aronov attached to his Reply to the government's Response to his Motion for attorney's fees, "In order for USCIS to expedite an FBI Name Check request, one of the following criteria must be established: . . . Writ of Mandamus—lawsuit pending in Federal Court." This policy is an unmistakable acknowledgment that the petitioner invoking his or her statutory right to file suit under section 1447(b) has a sound basis in law and fact for doing so. It is therefore more accurate to say that the agency's wholesale disregard of the 120-day statutory and regulatory deadline reflects its judgment that most naturalization applicants whose applications are delayed beyond the 120-day statutory deadline will not invoke their statutory right to sue.

[11] In addition to section 1447(b)'s specific command, the Administrative Procedures Act ("APA") offers a more general directive to agencies to resolve matters presented to them within a reasonable amount of time. *See* 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."). Our assessment of what is reasonable is informed by the relevant statutes and regulations. *See Towns of Wellesley, Concord and Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (discussing the guidelines, including the existence of a "rule of reason," which govern the time an agency may take to make a decision) (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)); *Caswell v. Califano*, 583 F.2d 9, 16 (1st

Moreover, the idea that the agency's early examination of Aronov was some sort of one-time "mistake," as the majority suggests, is belied by the briefs, which contain ample discussion of the "flood" of section 1447(b) lawsuits arising from delays in the NNCP process.[12] As they reveal, it was the agency's *regular practice* to violate its own regulations by examining candidates before receiving NNCP results, and then to compound that error by missing the statutory and regulatory adjudication deadline, thereby giving rise to a substantial number of lawsuits against the agency, at a cost both to taxpayers and applicants. USCIS engaged in precisely that conduct in Aronov's case. Yet, according to the majority, this is a pre-litigation position "justified to a degree that could satisfy a reasonable person." That is an indulgent reasonable person who would view this government conduct so benignly.[13]

Finally, the majority imports national security concerns into its defense of USCIS's handling of Aronov's

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Cir. 1978) (indicating that courts may look to statutory text to provide a reasonable time limit on agency action). Here, section 1447(b) and 8 C.F.R. § 335.3(a) provide such guidance. *See Sze v. INS*, No. C-97-0569 SC, 1997 WL 446236, at *7 (N.D. Cal. July 24, 1997) ("[T]he 120-day rule provides the court with a measure of what constitutes a reasonable period for INS to process naturalization applications.").

[12] *See* Brief for American Immigration Lawyers Association, as Amicus Curiae in Support of Plaintiff, at 6-7.

[13] I acknowledge the oddity that arises because of the agency's regulations. If USCIS had complied with its regulations and waited to interview Aronov until the FBI name check had been completed, his waiting time for the completion of the naturalization process might have been longer than it was here. This fact does not alter the legal analysis. Once USCIS gave Aronov his initial interview, it had to confront the clear timing obligation imposed by Congress.

application. It asserts sweepingly that "the choice by USCIS to favor national security . . . regardless of whether the interview was prematurely granted here, cannot be unreasonable." There is no basis in federal law for holding that an agency is substantially justified in ignoring its own regulations as long as it dutifully cites a national security interest.

Moreover, the majority's invocation of these national security interests reflects its continuing misapprehension of what this case is about. There is no challenge to the general validity of the name-check policy. There is no suggestion that Aronov's naturalization application should have been approved without the security check that the agency deemed necessary.[14] Once Aronov filed a

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[14] In citing these national security interests, the majority accepts uncritically the relevance of the government's argument that "background checks are critical to insuring public safety and national security." I do not dispute this proposition, which is irrelevant to the disposition of the case. The majority also accepts uncritically the government's assertion that awarding Aronov attorney's fees would "create an enormous incentive for individuals frustrated with delays in the naturalization process to file mandamus law-suits." It is the agency itself that gives applicants an incentive to file suit by choosing to request expedition of name checks if an applicant files suit. The agency could remove this incentive by requesting expedition before a suit is filed, as the record shows it could. Finally, the majority also endorses the government's suggestion that awarding attorney's fees will create a "disincentive for the agency to settle these cases." Yet the government already pursues such settlements in jurisdictions where it faces the risk of having to pay attorney's fees. *See, e.g., Kats v. Frazier*, No. Civ. 07-479, 2008 WL 2277598 (D. Minn. May 30, 2008); *Ghanim v. Mukasey*, 545 F. Supp. 2d 1146 (W.D. Wash. 2008); *Phompanya v. Mukasey*, No. C07-597MJP, 2008 WL 538981 (W.D. Wash. Feb. 25, 2008); *Berishev v. Chertoff*, 486 F. Supp. 2d 202 (D. Mass. 2007). The agency's decision to seek an early compromise despite facing a risk of paying attorney's fees is easy to understand. By refusing to settle the agency would risk the payment

lawsuit, his application was approved promptly. Indeed, the agency adopted a policy of giving priority to naturalization applicants who filed lawsuits pursuant to section 1447(b). If a naturalization applicant went through the time, trouble and expense of filing a lawsuit against the government, the applicant was moved to the head of the line. That policy might make sense to USCIS, but it should not be cost-free in light of the additional expense it imposes on the applicant for naturalization.[15]

Although I do not foreclose the possibility that the government could provide substantial justification grounded in the facts of a particular case for not complying with the 120-day statutory requirement, the government has advanced no such particularized justification here. Instead, the agency has offered only general justifications for the delay, including the importance of the agency's policy of requiring name checks for security

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of substantially higher EAJA fees because its unreasonable litigation position would compound the cost of its unreasonable prelitigation position.

[15] This is the same conclusion reached by the Tenth Circuit in *Al-Maleki*, 558 F.3d 1200, 1206. There the court was faced with the same relevant facts: USCIS had failed to meet its 120-day deadline for adjudicating an application; the applicant inquired about the delay, giving the agency notice of it; the source of the delay was the name check; after the applicant filed suit, USCIS asked the FBI to expedite the name check and adjudication was soon thereafter complete. As the court pointed out, these facts undermine the agency's contention that it is unable to process applications in a timely fashion because of the backlog in name check requests. *Id.* at 1210. Rather, USCIS has simply elected to ignore delayed applications until a lawsuit is filed. But USCIS's knowledge that its statutory deadline has passed and its capacity to address the problem by requesting expedition of the name check should motivate the agency to act before a suit is filed. Its decision to expedite requests only if it is sued "is not reasonable in fact." *See id.*

purposes and the significant backlog of names that the FBI is processing. These explanations, however, do not justify the agency's disregard of the clear statutory mandate. Although I also acknowledge that the agency has valid—indeed persuasive—reasons for requiring comprehensive FBI name checks under ordinary circumstances, that policy determination cannot justify the failure to comply with a statutory deadline. *See, e.g.*, *Rotinsulu v. Mukasey*, 515 F.3d 68, 72 (1st Cir. 2008) ("An agency has an obligation to abide by its own regulations.").

Despite the agency's plaint to the contrary, USCIS was not caught in a hopeless bind between the national security imperatives of name check review and the 120-day statutory and regulatory deadline. As the facts in this case demonstrate, USCIS could have addressed the name check delay in a manner consistent with the applicable laws and regulations, and without sacrificing national security interests, by doing generally and more promptly exactly what it did here. Instead of waiting for a lawsuit, the agency could have bumped applicants "mistakenly" interviewed before their name checks were completed to the front of the name check line before the 120-day deadline lapsed, saving the applicants and the agency the expense of a lawsuit. At the very least, in those cases where the deadline has already passed and the applicant has informed the agency of this fact, USCIS could ask the FBI for expedited treatment of the name check.[16] What the agency surely cannot do with "substantial justification" is blatantly ignore the requirements imposed on it by Congress and by itself.

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[16] *See supra* notes 14, 15 and accompanying text.

The majority's attempt to invoke an administrative policy to trump an explicit statutory command turns *Chevron* deference on its head. *See Stinson v. United States*, 508 U.S. 36, 44 (1993) ("Under *Chevron*, if a statute is unambiguous the statute governs . . . ." (citations omitted)). In light of the 120-day statutory directive, the regulatory confirmation of that directive, the agency's long delay (nearly four times the statutory period in length), and the absence of any evidence that the government tried to expedite Aronov's application to comply with the statute until he sued, the government's conduct toward Aronov can only be classified as unreasonable and not substantially justified. *See Russell v. Nat'l Mediation Bd.*, 775 F.2d 1284, 1290 (5th Cir. 1985) (concluding that the government's position was not substantially justified because it breached a clear statutory mandate). Accordingly, I would hold that the government was not substantially justified in its pre-litigation position.

III.

In order to defend the government's position and avoid the simple truth of this case, the majority has burdened its analysis of the prevailing party issue with undue complexity, and its analysis of the substantial justification issue with unwarranted national security concerns. After waiting through a delay that violated statutory and regulatory deadlines by 440 days, Aronov invoked his explicit statutory right to petition a district court to determine his naturalization application or order USCIS to do so. The lawsuit prompted the agency to complete the name check that had apparently caused the delay within a few weeks of the filing of the lawsuit. With that process completed, the parties asked the court to remand the case to the agency so the naturalization process could be completed. Invoking the EAJA, Aronov

then successfully sought a modest award of $4,270.94 in attorney's fees from the district court for the time and trouble he incurred. When the government appealed that award to us, a majority of the panel ruled for Aronov.

But Aronov's time and trouble were far from over. There was the government's petition for en banc review, and now this. The majority's fierce embrace of the government's opposition to this modest award is out of all proportion to the stakes. Its refusal to credit the district court's explanation of its remand order is unprecedented. Its invocation of national security concerns to justify the government's handling of Aronov's application is unjustified. We are left with a holding that is contrary to the purpose and the promise of the EAJA. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-1588

ALEXANDRE ARONOV, Plaintiff, Appellee,

v.

MICHAEL CHERTOFF, et al., Defendants,
Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

August 1, 2008

Before LYNCH, Chief Judge, TASHIMA* and LIPEZ, Circuit Judges.

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* Of the Ninth Circuit, sitting by designation.

OPINION

LIPEZ, Circuit Judge.

We address in this case whether appellee Alexandre Aronov is entitled to attorney's fees from the government under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. The act provides that a court shall award fees and expenses to a prevailing party in a civil action against the United States unless the court finds that the position of the government was substantially justified or that other circumstances make an award unjust.

Aronov filed the action in this case to force the government to act on his long-pending application for naturalization. The district court awarded him attorney's fees under the EAJA on the grounds that he was the prevailing party in the litigation and that the pre-litigation position taken by the government was not substantially justified. We affirm the district court's award.

I.

A native of Russia and a permanent resident of the United States since 2001, Aronov applied for naturalization with the Vermont Service Center of the United States Citizenship and Immigration Services ("USCIS") on May 22, 2004. After initial processing and completion of the required fingerprint check, Aronov's case was forward to the Boston USCIS office. Pursuant to 8 U.S.C. § 1446(b) and 8 C.F.R. § 335.2(a), Aronov was interviewed on February 14, 2005 regarding his application. However, as the government acknowledges, the agency's interview with Aronov was premature. The agency's own regulation dictates that an initial examination should be undertaken only after an applicant's full

background check has been completed. *See* 8 C.F.R. § 335.2(b) ("The Service will notify applicants for naturalization to appear before a Service officer for initial examination on the naturalization application only after the Service has received a definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed."). The government has not explained why it did not follow its regulation in this case.

At the time of the interview, Aronov was informed that his application could not be approved until additional security checks were completed. After hearing nothing from the USCIS for more than a year, Aronov received a letter from the agency on March 23, 2006 informing him that his application was being actively processed, but that additional review was required. The notice also instructed Aronov to contact USCIS if he did not receive a decision within six months of the date of the notice.

On August 28, 2006, more than eighteen months after being interviewed by the agency, Aronov filed an action in the district court under 8 U.S.C. § 1447(b), requesting that the court grant his application for naturalization or, alternatively, remand his application with instructions to the agency to adjudicate it.[1] Five weeks later, on Octo-

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[1] 8 U.S.C. § 1447(b) reads:

> If there is a failure to make a determination under section 1446 of this title [to grant or deny the naturalization application] before the end of the 120-day period after the date on which the examination is conducted . . . , the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand

ber 6, the government and Aronov filed a Joint Motion for Remand Pursuant to 8 U.S.C. § 1447(b). In full, the joint motion read:

> Pursuant to 8 U.S.C. § 1447(b), the parties in this action, plaintiff . . . and defendants Michael Chertoff, Secretary of the United States Department of Homeland Security, et al., hereby jointly move this Honorable Court to remand this matter to the USCIS, so that [it] can grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006. In support of this motion, the parties state as follows:
>
> 1. On or about August 28, 2006, plaintiff Alexandre Aronov filed this action.
>
> 2. Since that date, USCIS has completed its review of plaintiff's application for naturalization and, if jurisdiction is returned to the agency, would grant the application and schedule plaintiff's oath ceremony for no later than November 8, 2006.
>
> 3. The governing statute, 8 U.S.C. § 1447(b), provides that, in cases in which the agency has failed to render a decision on an application for naturalization within 120 days of the examination of the applicant, the applicant may file suit in district court requesting to adjudicate the application and "[s]uch court has jurisdiction over

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the matter, with appropriate instructions, to the [USCIS] to determine the matter.

> the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter."
>
> Wherefore, with good cause having been shown, the parties respectfully request that this Court remand this matter to USCIS so that it can grant plaintiff's application for naturalization and schedule plaintiff for an oath ceremony for no later than November 8, 2006.

On October 12, 2006, the court entered an electronic order granting the motion and the remand. The docket text for the remand order states: "Judge Nancy Gertner: Electronic ORDER entered granting 3 Joint Motion to Remand to US Citizenship and Immigration Services."[2] Aronov was sworn in as a U.S. citizen on November 8, 2006.

On November 28, 2006, Aronov filed an application for attorney's fees pursuant to the EAJA. The statute provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United

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[2] The "3" references the previously submitted joint remand motion.

> States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). The government opposed the application, asserting that Aronov was not a prevailing party in the litigation under the test established in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), and that the government's position regarding his application was substantially justified. The district court agreed with Aronov and ordered the government to pay him $ 4,270.94 in attorney's fees and costs. The government appeals this decision.

II.

Although parties are ordinarily required, win or lose, to bear their own attorney's fees, *see, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), a number of exceptions to this default rule have been adopted by statute. One such exception, the EAJA, authorizes the award of attorney's fees and costs to a litigant who has brought a civil suit against the United States if (1) she is the prevailing party in the matter; (2) the government fails to show that its position was substantially justified; and (3) no special circumstances would make such an award unjust. 28 U.S.C. § 2412(d)(1)(A); *see also Schock v. United States*, 254 F.3d 1, 4 (1st Cir. 2001). By offering qualifying litigants attorney's fees and other expenses, the EAJA seeks "to remove economic deterrents to parties who seek review of unreasonable government action." *Schock*, 254 F.3d at 4.

We review the district court's decision to grant or deny a fee application under the EAJA for abuse of discretion, *Id.*, "mindful that the district court has an 'intimate knowledge of the nuances of the underlying case,'" *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (quoting *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 292 (1st Cir. 2001)). "Such deference is particularly appropriate where, as here, the correctness of the court's decision depends in large part on the proper characterization of its own statements." *Id.* We apply this standard to both the prevailing party and substantial justification determinations. *Pierce v. Underwood*, 487 U.S. 552, 558-63 (1988) (substantial justification); *McDonald v. Secretary of HHS*, 884 F.2d 1468 (1st Cir. 1989) (prevailing party). An error of law is always an abuse of discretion. *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir. 2003).

A. Prevailing Party

1. The District Court's Decision

The district court began its attorney's fees analysis by addressing whether Aronov was a prevailing party under the EAJA. Invoking the Supreme Court's decision in *Buckhannon*, the district court found that the first requirement of the prevailing party standard—whether there was "a material alteration of the legal relationship of the parties"—was indisputably met because Aronov's status had changed from legal permanent resident to U.S. citizen. The government does not dispute that this requirement has been satisfied.

Proceeding to the second element of the test—whether there was a "judicial imprimatur[3] on the change" in status—the court rejected the government's assertion that the imprimatur requirement had not been met here because the agency had acted voluntarily to grant Aronov's naturalization application. Instead, the court concluded that the remand order satisfied the second element set forth in *Buckhannon* because the order effectuated the change in legal status that Aronov had sought. The court indicated that the remand did not merely return jurisdiction to USCIS. It also mandated the agency's compliance with a November 8, 2006 deadline for granting Aronov's naturalization. The court noted that "[w]here the government in *Buckhannon* took its conciliatory action purely voluntarily, and took on no further duties in the dismissal, the government here was granted not a dismissal, but a remand to the agency *conditional* on the granting of plaintiff's naturalization action by November 8, 2006." (emphasis in original). It asserted, therefore, that "[h]ad the naturalization not so occurred, the parties might very well be back in front of this court litigating a contempt action. This is far more than a catalyst theory—it was an order of the Court."

2. ***Buckhannon***

The issue in *Buckhannon* was whether a legislative change that effectively awarded petitioner its sought-after relief could provide the basis for a statutory fee award.[4] The plaintiff was an operator of assisted living

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[3] *Black's Law Dictionary* defines "imprimatur" as "a grant of approval; commendatory license or sanction." (8th ed. 2004).

[4] Although the Supreme Court in *Buckhannon* interpreted the fee-shifting provisions of the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. §§ 3601-3631, and the Americans with Disabili-

homes who failed a state fire inspection because some of the residents of plaintiff's homes were not capable of "self-preservation," as defined by West Virginia law. On behalf of itself and other parties similarly situated, the home operator brought suit against the state, two state agencies, and several individuals, seeking injunctive and declaratory relief to the effect that the "self-preservation" requirement violated provisions of the Fair Housing Amendments Act of 1988 ("FHAA") and the Americans with Disabilities Act of 1990 ("ADA"). Before the federal district court decided the issue, the West Virginia legislature eliminated the "self-preservation" requirement by statute. The court subsequently granted the defendants' motion to dismiss the case.

The plaintiffs filed an application for attorney's fees under the FHAA and the ADA, which was denied by both the district court and the Fourth Circuit. The Supreme Court affirmed. The Court held that petitioner could not obtain a fee award in the matter because the legal change had not been judicially sanctioned by a court. *Buckhannon*, 532 U.S. at 605 ("[D]efendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lack[ed] the necessary judicial *imprimatur*."). The Court explicitly rejected the notion that a party is entitled to attorney's fees simply because the underlying litigation

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ties Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213, "the principles underlying [its] holding [we]re broadly stated and [ ] not statute-specific." *Doe v. Boston Pub. Schs.*, 358 F.3d 20, 25 (1st Cir. 2004). Accordingly, we have held that the Supreme Court's reasoning in "*Buckhannon* is presumed to apply generally to all fee-shifting statutes that use the 'prevailing party' terminology." *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 22 n.8 (1st Cir. 2005) (quoting *Doe*, 358 F.3d at 25). The parties do not dispute the applicability of *Buckhannon* in this case.

triggered her sought-after relief—the so-called "catalyst theory." *Id.* It noted that previously it had "only awarded attorney's fees where the plaintiff ha[d] received a judgment on the merits or obtained a court-ordered consent decree," but not "where the plaintiff ha[d] secured the reversal of a directed verdict, or acquired a judicial pronouncement that the defendant ha[d] violated the Constitution unaccompanied by *judicial* relief," *id.* at 605-06 (internal citation and quotation marks omitted). A private settlement not incorporated into a court order does not confer prevailing party status. *See id.* at 606 ("Never have we awarded attorney's fees for a *nonjudicial* alteration of actual circumstances.") (emphasis added) (internal quotation omitted).

3. ***Smith v. Fitchburg Public Schools***

As a circuit, we have applied *Buckhannon* in a number of cases, *see Smith v. Fitchburg Public Schools*, 401 F.3d 16, 22 (1st Cir. 2005) (applying the Supreme Court's decision in the context of an action under the Individuals with Disabilities Education Act ("IDEA")); *Doe v. Boston Public Schools*, 358 F.3d 20, 22-26 (1st Cir. 2004) (similar analysis); *Kinton*, 284 F.3d at 30 (declining to award attorney's fees because the district court had not entered any order "compelling, or even leading to" the plaintiff receiving the relief it had requested), each time evaluating the specific facts of the case to determine whether the court's conduct was sufficient to "provide the necessary judicial imprimatur on the change in the legal relationship between the parties," *Smith*, 401 F.3d at 23 (citation omitted).

The government relies in particular on our *Smith* decision. There, the parents of a disabled child initiated a proceeding under the IDEA against the Fitchburg Public Schools, seeking special education services for their

child. After several pre-hearing orders by a hearing officer of the Bureau of Special Education Appeals ("BSEA"), the entity in charge of overseeing the proceeding, the parties reached a private settlement that provided the plaintiffs all of the relief they had sought. The plaintiffs subsequently filed an action in the district court seeking to recover attorney's fees pursuant to the IDEA. They argued that the orders of the BSEA, which required the school district to take certain actions and set deadlines for those actions, served as the necessary "judicial imprimatur" to grant them "prevailing party" status. *Id.* at 22.

After recognizing that the administrative relief was not in the form of a consent decree or a final judgment on the merits, and that the plaintiffs had not argued that the administrative orders were functionally equivalent to a consent decree, we addressed in *Smith* whether the facts of the case generally met the two required elements of *Buckhannon*.[5] Acknowledging that the plaintiffs had achieved a material change in the parties' relationship—thereby satisfying the first prong of *Buckhannon*, we rejected the plaintiffs' claim for attorney's fees on the ground that the BSEA orders had not provided sufficient "judicial imprimatur" on the relief obtained. *Id.* at 27. On this issue, we observed that when the administrative orders were imposed, the BSEA had not yet begun to analyze the plaintiffs' substantive claim—whether they were entitled to relief pursuant to

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[5] We noted in *Smith* that this circuit had not "squarely addressed whether judgments on the merits or consent decrees are the only forms of relief sufficient to confer prevailing party status, whether a functional equivalent of such relief may be adequate, or whether any other types of relief could satisfy *Buckhannon's* requirements." *Smith*, 401 F.3d at 23; *see also Doe*, 358 F.3d at 24 n.4.

the IDEA—because it had yet to convene a due process hearing. *Id.* at 26-27. The BSEA's decisions, therefore, were not substantive ones made after reviewing the merits of plaintiffs' claims, but rather orders directing Fitchburg to do what it had already promised the plaintiffs it would do. *Id.* at 27. Accordingly, the "orders and ruling were [not] issued . . . to place the weight of judicial authority behind Fitchburg's substantive concession that [plaintiff] was entitled to an IEP," and hence the relief obtained by the plaintiffs lacked the necessary judicial imprimatur. *Id.*

4. Applying *Buckhannon* and *Smith*

Citing *Smith*, the government contends that the district court's remand order did not provide the necessary "judicial imprimatur" for Aronov's sought-after remedy, naturalization. The government maintains that it already had voluntarily decided to grant Aronov's application. It then established a specific time-frame for doing so, and the court order merely "memorialized" the government's independent concessions, as it did in *Smith*. Further, the remand order did not include any "appropriate instructions" directing the government to take specific action, *see* 8 U.S.C. § 1447(b), or retain jurisdiction in order to determine whether the government followed through on its voluntary decision to approve Aronov's application. Accordingly, the order had no substantive effect on the proceeding and, therefore, did not constitute a "judicial imprimatur," as the Supreme Court defined it in *Buckhannon* and as we applied the standard in *Smith*.

We reject the government's arguments and find its reliance on *Smith* misplaced. Most of the language from *Smith* relied upon by the government comes in that portion of the panel's decision where it assesses whether the plaintiff's relief, "even though not in the form of a con-

sent decree or a final judgment on the merits, comports with the overarching requirements of *Buckhannon;* that is, whether the [administrative hearing officer's involvement] provided the necessary judicial imprimatur on a material alteration of the legal relationship between the parties." *Smith*, 401 F.3d at 26. As the panel noted, "[the plaintiff] does not argue that the order dismissing her case is the functional equivalent of a consent decree, and thus we deem that argument waived." *Id.* at 24. Moreover, the *Smith* panel assessed whether the order of an administrative hearing officer, rather than the order of a judge, meets the prevailing party standard set forth in *Buckhannon.* Since the administrative law analog to a judicial consent decree is uncertain, the focus of the panel in *Smith* was whether the administrative orders were akin to a judgment on the merits. In short, the *Smith* decision has little relevance to the prevailing party issue here, which turns on whether the district court's order was the functional equivalent of a consent decree.

Nevertheless, though offered as dicta, the *Smith* panel made some useful observations about the concept of the functional equivalent of a consent decree. Specifically, the panel distinguished between a court's incorporation of the terms of an agreement between the parties, which made the court order functionally equivalent to a consent decree, and mere recognition of an agreement accompanied by the dismissal of the case because there is no longer a dispute, which was not equivalent to a consent decree. Relying on the Fourth Circuit's decision in *Smyth v. Rivero*, the panel put that critical difference in these terms:

> Thus, "either incorporation of the terms of the agreement or a separate provision retaining jurisdiction over the agreement will

> suffice for [an order to be considered the functional equivalent of a consent decree]" . . . In contrast, "[w]here a court merely recognizes the fact of the parties' agreement and dismisses the case because there is no longer a dispute before it, the terms of the agreement are not made part of the order and consequently will not serve as a basis of jurisdiction."

Smith, 401 F.3d at 24 (quoting *Smyth*, 282 F.3d 268, 283 (4th Cir. 2002)).

Here, the district court held that its remand order fell under the first category of orders—where the court incorporates the terms of the parties' agreement into an order—rather than the second—where the court merely recognizes the agreement and dismisses the matter as no longer in dispute. As the district court put it:

> In *Buckhannon*, the government acted independently to give the plaintiff what it wanted, and *then* sought dismissal. Here, *the* Court remanded specifically "so that USCIS can grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006." This is the judicial imprimatur required by and lacking in the specific facts of *Buckhannon*. Where the government in *Buckhannon* took its conciliatory action purely voluntarily, and took on no further duties in the dismissal, the government here was granted not a dismissal, but a remand to the agency *conditional on* the granting of plaintiff's naturalization by November 8, 2006. Had the naturalization

> not so occurred, the parties might very well be back in front of this Court litigating a contempt action. This is far more than a catalyst theory—it was an order of the Court.

Aronov v. Chertoff, No. 06-11526-NG, 2007 U.S. Dist. LEXIS 40455, at * 4-5 (Jan. 30, 2007) (emphasis in original).

Because the district court is in the best position to explain the meaning of its own order, we defer to its conclusion on the significance of the remand order. *See Kinton*, 284 F.3d at 30 ("Clearly, the district court is in the best position to determine whether its statements . . . should be considered as the functional equivalent of a judicial order within the meaning of *Buckhannon.*"); *Harvey v. Johanns*, 494 F.3d 237, 242 (1st Cir. 2007) ("We must, of course, accord deference to the district court's interpretation of the wording of its own order."); *see also Lefkowitz v. Fair*, 816 F.2d 17, 22 (1st Cir. 1987) ("[U]ncertainty as to the meaning and intendment of a district court order can sometimes best be dispelled by deference to the views of the writing judge.").

Moreover, based on our assessment of the remand order and the circumstances of its issuance, we see no reason to question the district court's assessment of its own work. After Aronov filed suit in the district court under the statute, USCIS lost jurisdiction to adjudicate Aronov's application, thereby precluding it from entering a binding legal agreement with Aronov regarding his application. 8 U.S.C. § 1447(b) ("Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the [USCIS] to determine the matter."); *see Etape v. Cher-*

toff, 497 F.3d 379, 384-85 (4th Cir. 2007).[6] The parties acknowledged as much in their joint motion for remand to the district court, which highlights the terms of 8 U.S.C. § 1447(b). Therefore, despite the agency's concession to allow Aronov's naturalization, it did not have the authority to effectuate that outcome until the district court returned jurisdiction to the agency. The court's order was indispensable to the naturalization outcome.

The court's remand order also ended the dispute by providing Aronov his sought-after relief. To be sure, the district court relied on the government's statements in the joint motion for remand that naturalization was appropriate. However, because of the jurisdictional element, the district court could reasonably conclude that it was ultimately the remand order, not the agency's concession, that brought about the material change in the parties' relationship and "place[d] the weight of judicial authority" on the agreed-upon alteration in Aronov's legal status, *see Smith*, 401 F.3d at 26.

There remains the question of the form of the court's order. If the district court had entered an order explicitly setting forth the agreement of the parties as set forth in the joint motion for remand, its order would unques-

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[6] The question of whether the court maintains exclusive jurisdiction or, alternatively, concurrent jurisdiction with the USCIS has been litigated in other courts. Most courts have held that the district court has exclusive jurisdiction over the application until it has acted pursuant to the statute. *See, e.g.*, *Etape*, 497 F.3d at 384-85 (holding that § 1447(b) vests the district court with exclusive jurisdiction over a naturalization application); *United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir. 2002) (en banc) (same). *But see, e.g.*, *Bustamante v. Chertoff*, 533 F. Supp. 2d 373, 381 (S.D.N.Y. 2008) (reaching the opposite conclusion). Here, the government does not assert that the USCIS maintained jurisdiction over Aronov's application after he filed suit in district court.

tionably be a consent decree. *See Frew v. Hawkins*, 540 U.S 431, 437 (2004) ("A consent decree 'embodies an agreement of the parties' and is also 'an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.'" (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992))); *see also Black's Law Dictionary* (8th ed. 2004) (defining a "consent decree" as "[a] court decree that all parties agree to"). Yet the district court's brief remand order here, which incorporated the terms of the joint motion by reference, had the same import and effect. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (indicating that a court would maintain jurisdiction to enforce a settlement agreement "if the parties' obligation to comply with [its] terms . . . had been made part of the order of dismissal—either by separate provision . . . or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."). Hence the brief remand order was the functional equivalent of a consent decree. If the government had failed to comply with the terms of the remand order, Aronov could have sought enforcement of the order through a contempt proceeding, as the district court noted. He would not have had to file a separate contract action against the agency or another suit under § 1447(b).[7]

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[7] This distinction has an analog in the private realm, where one party is seeking to enforce the terms of a settlement agreement against another private party. If the terms of the settlement agreement have not been incorporated into a court order, the federal courts will often lack jurisdiction to enforce its terms. In contrast,

There is ample authority for the proposition that the functional equivalent of a consent decree satisfies the requirements of *Buckhannon*.[8] Like our sister circuits, we

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where the parties have obtained a consent decree or a court order that either incorporates the terms of the settlement agreement or explicitly retains jurisdiction, a federal court will possess "enforcement" or "ancillary" jurisdiction to enforce the terms of the order. *See Kokkonen*, 511 U.S. at 381; *Buckhannon*, 532 U.S. at 604 n.7 (*"[F]ederal jurisdiction* to enforce a private contractual settlement will often be lacking *unless* the terms of the agreement are incorporated into the order of dismissal.") (emphasis added); *see also Fafel v. DiPaola*, 399 F.3d 403, 414 (recognizing that a federal court had ancillary jurisdiction to enforce its prior Fed. R. Civ. Pro. 68 judgment because the judgment, although limited in nature, "necessarily incorporate[d] the terms of the underlying Rule 68 offer" and the district court limited its exercise of ancillary jurisdiction to enforcing the terms of that prior judgment); *Martel v. Fridovich*, 14 F.3d 1, 3 n.4 (1st Cir. 1993) (per curiam) ("The appropriate vehicle for enforcement of the consent decree is an action for contempt brought before the court responsible for the decree.").

[8] *See, e.g.*, *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (holding that a court order, characterized by the defendant as a stipulated settlement, was sufficient to support a finding of judicial imprimatur where the order contained mandatory language, included the judge's signature, and was judicially enforceable); *Smyth*, 282 F.3d at 281 ("We doubt that the Supreme Court's guidance in *Buckhannon* was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly."); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003) ("[S]ome settlement agreements, even though not explicitly labeled as a 'consent decree' may confer 'prevailing party' status, if they are sufficiently analogous to a consent decree."); *Carbonell v. INS*, 429 F.3d 894, 901 (9th Cir. 2005) ("[W]hen a court incorporates the terms of a voluntary agreement into an order, that order is stamped with sufficient 'judicial imprimatur' for the litigant to qualify as a prevailing party for the purpose of awarding attorney's fees."); *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir. 2002) ("A formal consent decree is unnecessary . . . because the explicit retention of jurisdiction or the court's order specifically approving the terms of the settlement are . . . the functional

do not read *Buckhannon* so narrowly as to preclude all forms of judicial relief other than a judgment on the merits or a court order in the form of a consent decree, or one explicitly labeled as such, from satisfying the judicial imprimatur requirement.[9] Therefore, the district court did not abuse its discretion in holding that its remand order issued pursuant to § 1447(b) incorporated the terms of the parties' joint motion and hence was the functional equivalent of a court-ordered consent decree.[10]

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equivalent of the entry of a consent decree."); *Davy v. CIA*, 456 F.3d 162, 166 (D.C. Cir. 2006) ("Where a settlement agreement is embodied in a court order such that the obligation to comply with its terms is court-ordered, the court's approval and the attendant judicial over-sight (in the form of continuing jurisdiction to enforce the agreement) may be equally apparent. We will assume, then, that an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs us."); *see also Bell v. Bd. of County Comm'rs. of Jefferson County*, 451 F.3d 1097, 1103 (10th Cir. 2006) ("Most circuits recognize that some settlement agreements, even though not explicitly labeled as a consent decree may confer prevailing party status, if they are sufficiently analogous to a consent decree.") (internal quotations omitted).

[9] Although in *Smith* we noted that there was disagreement among our sister circuits on this question, citing the Eighth Circuit's decision in *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003), as an example of a court reading *Buckhannon* narrowly to preclude all other forms of relief, the Eighth Circuit has more recently repudiated our reading of its decision. *See Smith*, 401 F.3d at 23. In *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1085 n.2 (8th Cir. 2006), the court asserted that its decision in *Christina A.* did not foreclose the possibility that other types of court-ordered relief could provide the requisite judicial imprimatur required by *Buckhannon*.

[10] The dissent asserts that the issue of whether the district court's remand order was the equivalent of a consent decree was not raised by either party, nor was it the theory on which the district court relied, and therefore we should not analyze that issue in deciding the

Accordingly, the order constituted the necessary "judicial imprimatur" on the parties' change in legal relationship, qualifying Aronov as a prevailing party.

B. Substantial Justification

1. Framework for Review

The government bears the burden of demonstrating that its position was substantially justified. *Schock*, 254 F.3d at 5. The Supreme Court has interpreted the "substantially justified" language in the EAJA to require reasonableness: "[A]s between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565; *see also, e.g.*, *Schock*, 254 F.3d at 5; *Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 40-41 (1st Cir. 2001). Thus, the key question is whether the government's position has "a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n.2.

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case. The district court did not use the phrase "functional equivalent of a consent decree" in its decision awarding attorney's fees and costs to Aronov. Nevertheless, in addressing the judicial imprimatur question in its decision, the district court described its order as incorporating the terms of the parties' joint motion for remand. It further stated that its order could be enforced through a contempt action. Hence the district court described its order in consent-decree terms. The government chose not to challenge this consent-decree aspect of the district court's decision. Instead, it advanced a largely irrelevant judicial imprimatur argument under our *Smith* decision that it deemed more favorable to its position. Aronov responded to the argument made by the government. He had no obligation to respond to an argument that the government did not make.

As a matter of law, the government's position is substantially justified when the government's actions are required by a statute or law. *See Dantran*, 246 F.3d at 41; *United States v. One Parcel of Real Prop.*, 960 F.2d 200, 208-09 (1st Cir. 1992); *see also United States v. B & M Used Cars*, 860 F.2d 121, 124 (4th Cir. 1988) ("Whether the government's decision . . . was reasonable must be examined in light of . . . the appropriate statute."). Additionally, the government's position may be substantially justified even if its reasonable interpretation of its legal obligations is not ultimately affirmed by a court. *Schock*, 254 F.3d at 5. The district court having concluded that the government's litigation position was substantially justified, we review only the government's pre-litigation position. 28 U.S.C. § 2412(d)(2)(D); *Schock*, 254 F.3d at 5.

2. The District Court's Decision

In focusing on the government's pre-litigation position, the court noted that more than a year and a half had passed between Aronov's citizenship exam and the filing of his action—an amount of time that exceeded by a multiple of four the statutory period that was a prerequisite for filing an action under 8 U.S.C. § 1447(b). The court viewed this delay as unjustified because the government had procedures in place for expediting an FBI name check application, including issuance of a writ of mandamus. The court concluded that "[i]t is not 'substantially justified' for the government to force naturalization applicants to incur additional expense—and the courts to be burdened—just to have naturalization applications processed in the timely manner already supposedly guaranteed by statute." It rejected the government's argument that it was unable to act on Aronov's application sooner because the FBI did not complete its background check until September 2006.

3. The Government's Position

The government claims that two statutes justify its actions and inactions on Aronov's application. First, it cites 8 U.S.C. § 1446(a), which provides that "[b]efore a person may be naturalized, an employee of the [USCIS], or of the United States designated by the Attorney General, shall conduct a personal investigation of the person applying for naturalization." It asserts that because the personal investigation of Aronov required by the statute had not been completed before he filed suit, USCIS could not legally grant him citizenship. Second, the government cites language included by Congress in the 1998 Appropriations Act, which has continuing effect: "During fiscal year 1998 and each fiscal year thereafter, none of the funds appropriated or otherwise made available to [USCIS] shall be used to complete adjudication of an application for naturalization unless [USCIS] has received confirmation from the Federal Bureau of Investigation that a *full criminal background check* has been completed . . . ." Depts. of Commerce, Justice & State, The Judiciary & Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2448-49 (1997) (8 U.S.C. § 1446 note) (emphasis added). It asserts that this language prevented USCIS from taking final action on Aronov's application before the FBI finished its background check in September 2006, after Aronov had filed suit.

In response, Aronov argues that neither the language of 8 U.S.C. § 1446(a) nor the 1998 Appropriations Act requires the USCIS to undertake the comprehensive FBI name check, which the government concedes has been the primary cause of the delay in Aronov's proceeding. Further, he notes that the agency policy calling for such name checks has not been codified in any regulation. Fi-

nally, he cites a report from the USCIS's ombudsman that raised questions about the wisdom of the USCIS policy to require such searches, particularly in light of the significant backlog of applicants waiting for their FBI name checks to be completed.

Before addressing the parties' arguments, we briefly discuss the FBI name check process and the USCIS's use of that process for adjudicating naturalization applications.

a. The FBI's National Name Check Program

The FBI's National Name Check Program ("NNCP") was established during the Eisenhower Administration by Executive Order 10450. The NNCP reviews information in the FBI's files to determine whether an individual has been the subject of, or mentioned in, any FBI investigations. NNCP provides this information to dozens of federal, state, and foreign agencies "seeking background information from FBI files on individuals before bestowing a privilege—[w]hether that privilege is government employment or an appointment; a Green card or naturalization; admission to the bar; or a visa for the privilege of visiting our homeland." *Foreign Travel to the United States: Testimony Before the H. Comm. on Gov. Reform* (July 10, 2003) (statement of Robert J. Garrity, Jr., Assistant Dir., Records Mgmt. Div., Fed. Bureau of Investigation), *available at* 2003 WL 21608243 (hereinafter *Garrity*). The NNCP also "conducts numerous name searches in direct support of the counterintelligence, counterterrorism, and homeland security efforts of the FBI." *Id.*

The USCIS commissions the FBI on a fee-for-service basis to provide the name checks, in accordance with USCIS-defined standards. USCIS Ombudsman, *Annual*

Report to Congress June 2007, at 38, *available at* http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

The scope of these standards has expanded over time. Until late 2002, the FBI was required to search only its "main" files for possible links between the applicant and an individual who was previously the target of an FBI investigation. In late 2002, however, in response to heightened security concerns after the attacks on September 11, 2001, and an incident in which an individual who was a member of a terrorist group was awarded benefits, the USCIS revised its policy and began requiring more comprehensive FBI name checks. These checks entailed a search of the FBI's "reference" files in addition to its main investigation files. United States Dep't of Homeland Security, Office of Inspector General, *A Review of the U.S. Citizenship and Immigration Services' Alien Security Checks* 24 n.30 (Nov. 2005), *available at* www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-06_Nov05.pdf; *see also* Spencer S. Hsu and N.C. Aizenman, *FBI Name Check Cited in Naturalization Delays*, Wash. Post, June 17, 2007, at A1. Additionally, USCIS resubmitted 2.4 million applicant names to the FBI for these expanded checks. As currently undertaken, the FBI name check process entails the following:

> The name is electronically checked against the FBI Universal Indices (UNI). The searches seek all instances of the individual's name and close date of birth, whether a main file name or reference. . . . The names are searched in a multitude of combinations, switching the order of first, last, middle names, as well as combinations with just the first and last, first and middle, and

> so on. It also searches different phonetic spelling variations of the names . . . .
>
> If there is a match with a name in a FBI record, it is designated as a 'Hit,' meaning that the system has stopped on a possible match with the name being checked, but now a human being must review the file or indices entry to further refine the names 'Hit" on. . . .
>
> Approximately 85% of name checks are electronically returned as having "No Record" within 72 hours. . . . A secondary manual name search usually identifies an additional 10% of the requests as having a "No Record" . . . . The remaining 5% are identified as possibly being the subject of an FBI record. The FBI record must now be retrieved and reviewed. If the records were electronically uploaded into the FBI Automated Case Support (ACS) electronic recordkeeping system, it can be viewed quickly. If not, the relevant information must be retrieved from the existing paper record.

Garrity, *supra*.

Before September 11, 2001, the FBI received approximately 2.5 million name check requests per year. After the USCIS revised its policy in 2002, that number increased. *Id.* For example, in the FBI's fiscal year 2003 alone, it received over 6 million name check requests. Federal Bureau of Investigation, *National Name Check Program*, http://www.fbi.gov/hq/nationalnamecheck.htm (last visited June 27, 2008). USCIS currently processes

approximately 1.5 million applications requiring name checks annually, including applications both for green cards and for citizenship, and 99% of these are cleared by the FBI in less than six months. Julia Preston, *Rules Eased to Expedite Green Card Applications*, N.Y. Times, Feb. 12, 2008, at A12. Other applications, however, take longer; approximately 140,000 USCIS applications have been held up in the FBI's name check system for six months or longer. Spencer S. Hsu, *U.S. To Skirt Green-Card Check*, Wash. Post, Feb. 12, 2008, at A3. As of May 2007, of the about 329,000 cases pending before USCIS, "64% were stalled [with the agency] for more than 90 days, 32% for more than one year and 17% for more than two years." Hsu and Aizenman, *supra*, at A1.[11]

The FBI name check is one piece of the larger background check that the USCIS commissions for all naturalization applicants. In addition to the FBI name check, the agency conducts a name check in the Interagency Border Inspection System (IBIS), "a multiagency effort with a central system that combines information from multiple agencies, databases and system interfaces to compile data relating to national security risks, public

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[11] To help alleviate this backlog, USCIS decided in February 2008 to give preliminary approval to green card applicants for whom an FBI fingerprint check and Interagency Border Inspection Services check have been successfully completed and an FBI name check request has been pending for over six months. If the eventual name check turns up negative information, the visa will be canceled and deportation proceedings commenced. Memorandum from Michael Aytes, Assoc. Dir., USCIS Domestic Operations, to USCIS Field Leadership 2 (Feb. 4, 2008), *available at* http://www.uscis.gov/files/pressrelease/DOC017.pdf. This change does not apply to citizenship applicants because "revoking naturalization is a much more difficult thing to do" than revoking a green card. Hsu, *supra*, at A3 (quoting USCIS Spokesman Christopher S. Bentley).

safety issues and other law enforcement concerns." Fact Sheet, USCIS Press Office, *Immigration Security Checks—How and Why the Process Works* 2 (April 25, 2006), *available at* http://www.uscis.gov/files/pressrelease/security_checks_42506.pdf. Results of an IBIS check are typically available immediately. *Id.* The FBI also obtains an applicant's fingerprints in order to search the existing criminal databases for records of arrests and criminal convictions. The FBI typically forwards a response on the fingerprint check to USCIS within 24 to 48 hours. *Id.*

b. Statutory Requirements

There is nothing in the language of 8 U.S.C. 1446(a) or the 1998 Appropriations Act that requires USCIS to include the NNCP in the naturalization process. Neither provision cited by the government states explicitly that an FBI name check is required, let alone a name check that includes an evaluation of all FBI reference files in addition to the main files. Section 1446(a) requires only that a *"personal investigation"* be conducted prior to allowing an individual to be naturalized, while the 1998 appropriations bill limits funds to the USCIS to complete adjudication of a naturalization application until the agency has received FBI confirmation that a *"full criminal background check"* has been completed. There is no specification in the bill beyond this phrase. It is entirely plausible—indeed likely—that the language used by Congress in the 1998 appropriations bill referred to the FBI's criminal history check, which is an established, preliminary step taken in the naturalization process, rather than the FBI name check.

Importantly, the FBI name check program had already been in place for decades at the time the statutes relied upon by the government were enacted. If Con-

gress intended to mandate that the USCIS commission FBI name checks before granting naturalization applications, it could have explicitly referenced such checks. *See, e.g., United States v. Cabrera*, 208 F.3d 309, 314 (1st Cir. 2000) (examining Congress's other textual options in interpreting the statutory language at issue). Other than an unpersuasive reliance on the text of the statutes, the government has not identified any evidence that Congress intended to require the FBI name checks.[12]

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[12] Although the government has not invoked it, a regulation relevant to interpreting the scope of the statutory provisions at issue does exist. In full, 8 C.F.R. § 335.2(b) reads:

> Completion of criminal background checks before examination. The Service will notify applicants for naturalization to appear before a Service officer for initial examination on the naturalization application only after the Service has received a definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed. A definitive response that a full criminal background check on an applicant has been completed includes:
>
> (1) Confirmation from the Federal Bureau of Investigation that an applicant does not have an administrative or a criminal record;
>
> (2) Confirmation from the Federal Bureau of Investigation that an applicant has an administrative or a criminal record; or
>
> (3) Confirmation from the Federal Bureau of Investigation that two properly prepared fingerprint cards (Form FD-258) have been determined unclassifiable for the purpose of conducting a criminal background check and have been rejected.

The regulation does not assist the agency's claims because, like the statutes, it gives no indication that a "full" criminal background check includes an FBI name check.

Indeed, USCIS did not even begin requiring the full, comprehensive FBI name checks until 2002, years after passage of the applicable statutes. That fact confirms that the comprehensive name checks were a result of a policy change within the agency after the September 11, 2001 attacks rather than a congressional mandate.[13]

In sum, the statutes cited by the government did not require USCIS to commission FBI name checks—let alone comprehensive ones—before adjudicating a naturalization application. Therefore, the "mandated by statute" rationale fails as a substantial justification for the agency's delays in adjudicating Aronov's application.

c. The Application of *Chevron*

Perhaps realizing the flaws in its statutory argument, the government offers an alternative basis for finding that its pre-litigation position on Aronov's naturalization application was substantially justified. Relying on *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), the government asserts that we must defer to the USCIS's decisions regarding the scope of the "personal investigation" and "full criminal background check" of an applicant for naturalization because Congress, pursuant to the statutes discussed above, has committed to the agency the decision-making

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[13] The USCIS's recent change of policy to grant thousands of green-card applicants permanent residency before their full FBI name checks are completed reinforces this view. Although the agency did not take the same step with respect to naturalization applications, it attributed the differential treatment to the difficulty of revising naturalization decisions, not to statutory requirements. Hsu, *supra*, at A3 (citing USCIS Spokesman Christopher S. Bentley). In so explaining the discrepancy, the agency implicitly acknowledged that it was not prohibited *by law* from extending the policy to naturalization decisions.

authority on these issues. The government argues that the agency, having concluded that the comprehensive FBI name checks are "essential" to the background investigations, was substantially justified in awaiting completion of Aronov's background check before adjudicating his naturalization application. Acknowledging that a small percentage of name checks take a considerable amount of time to complete, the agency asserts implicitly that those isolated delays, which are the fault of the FBI and not USCIS, should not prevent the government from maintaining the name check requirement as its policy and applying to it Aronov's naturalization application. That is, the agency argues that its general policy of requiring the name checks excuses the delays associated with individual naturalization applications, such as Aronov's.

Even if the government is entitled to invoke *Chevron* to defend its general policy on the FBI name check process, *see, e.g.*, Cass Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006) (analyzing the standards for determining whether an agency interpretation is entitled to evaluation under the *Chevron* framework), deference to its general policies does not require us to find substantial justification in this particular instance.[14] The government's eighteen-month delay in acting on Aronov's naturalization application directly contravened § 1447(b), which gives a district court jurisdiction to evaluate a naturalization application if the agency has failed to adjudi-

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[14] Aronov argues on a number of grounds that the USCIS's name check policy is not entitled to *Chevron* deference. We need not reach that question because of our conclusion that even if the agency is entitled to *Chevron* deference for its policy requiring FBI name checks, this deference does not substantially justify the government's pre-litigation conduct in this particular instance.

cate the application within 120 days after conducting its initial examination. *See Etape*, 497 F.3d at 385; *see also Hovsepian*, 359 F.3d at 1163 ("A central purpose of [§ 1447(b)] was to reduce the waiting time for naturalization applicants." (citing H.R. Rep. No. 101-187, at 8 (1989); 135 Cong. Rec. H4539-02, H4542 (1989) (statement of Rep. Morrison))) Both the courts and the agency itself have interpreted § 1447(b) as imposing a 120-day deadline for agency action. *See Hovsepian*, 359 F.3d at 1161; 8 C.F.R. § 335.3(a) ("A decision to grant or deny the application *shall be made* at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization . . . .") (emphasis added); *see also Walji v. Gonzales*, 500 F.3d 432, 439 (5th Cir. 2007) ("[B]ecause the clear intent of Congress was to accelerate naturalization applications, and the statutory and regulatory language gives a definite time frame for decision once an examination has occurred, [§ 1447] is violated in situations [where the 120-day period is not complied with].").

In addition to § 1447(b)'s specific command,[15] the Administrative Procedures Act ("APA"), 5 U.S.C.

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[15] The dissent's treatment of the 120-day time frame established by 8 U.S.C. § 1447(b) is curious. Although the dissent acknowledges that the agency has adopted a regulation, 8 C.F.R. § 335.3(a), that treats the 120-day time frame as a deadline, the dissent treats the statutory and regulatory time frame as merely aspirational in nature, with no consequence for the agency if it fails to comply. If Congress had taken such a relaxed view of its 120-day time frame, it would not have explicitly provided that an applicant whose naturalization application remains unresolved at the end of the 120-day period may file suit in federal court to have the application either adjudicated by the court or remanded to the agency with instructions to adjudicate it. *See, e.g.*, *Etape*, 497 F.3d at 384-85 (concluding that after an applicant has filed suit with the district court pursuant to § 1447(b), the court has exclusive jurisdiction over the application).

§ 555(b), offers a more general directive to agencies to resolve matters presented to it within a reasonable amount of time. *See* 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."). Our assessment of what is reasonable is informed by the relevant statutes and regulations. *See Towns of Wellesley, Concord and Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (discussing the guidelines, including the existence of a "rule of reason," which govern the time an agency may take to make a decision) (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984))); *Caswell v. Califano*, 583 F.2d 9, 16 (1st Cir. 1978) (indicating that courts may look to statutory text to provide a reasonable time limit on agency action). Here, § 1447(b) and 8 C.F.R. § 335.3(a)[16] provide such guidance. *See Sze v. INS*, No. C-97-0569 SC, 1997 U.S. Dist. LEXIS 10822, 1997 WL 446236, at *7 (N.D. Cal. July 24, 1997) ("[T]he 120-day rule provides the court with a measure of what constitutes a reasonable period for INS to process naturalization applications.").

Without foreclosing the possibility that the government could provide substantial justification grounded in the facts of a particular case for not complying with the 120-day statutory requirement, the government has advanced no such particularized justification here. Instead, the agency has offered only general justifications for the delay, including the agency's policy of requiring name checks for security purposes and the significant backlog

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[16] 8 C.F.R. § 335.3(a) states: "A decision to grant or deny the [naturalization] application shall be made at the time of the initial examination or within 120-days after the date of the initial examination of the applicant for naturalization under § 335.2."

of names that the FBI is processing. These explanations, however, do not justify the agency's disregard of the clear statutory mandate. As a district court deciding this exact issue has aptly stated:

> But while a reasonable person would not dispute the necessity of conducting a background check on an applicant for naturalization, a reasonable person would require a satisfactory justification for a substantial delay in completing the background check. Indeed, government agencies are required to conclude matters presented to them within a "reasonable time." *See* 5 U.S.C. § 555(b). Otherwise, an applicant for naturalization remains in perpetual limbo and is by de facto, denied his citizenship, a right that has been afforded by Congress to deserving individuals since the rise of the American democracy. This is particularly true when Congress has enacted legislation permitting the applicant to apply to federal district court if a decision is not rendered on the application within 120 days of the completion of the examination under 8 U.S.C. § 1447(b). Here, Defendants offer no justification for the delay; rather, they merely state that "background checks were necessary and had to be completed before the plaintiff could be naturalized." This explanation merely restates, in a conclusory manner, the necessity of completing the background check; it does not justify the delay.

Alghamdi v. Ridge, No. 3:05cv344-RS, 2006 U.S. Dist. LEXIS 68498, 2006 WL 5670940, at *14 (N.D. Fla. Sept. 25, 2006). Although we also acknowledge that the agency has valid—indeed persuasive—reasons for requiring comprehensive FBI name checks under ordinary circumstances, that policy determination cannot justify the failure to comply with a statutory deadline. *See, e.g.*, *Rotinsulu v. Mukasey*, 515 F.3d 68, 72 (1st Cir. 2008) ("An agency has an obligation to abide by its own regulations.").

Indeed, despite the agency's assertions that the FBI backlog was a significant cause of the delays in this case, the ultimate cause of the agency's failure to comply with the law was its own non-compliance with its regulations.[17] If the agency had properly deferred conducting its initial interview of Aronov until the FBI name check process had been completed, the statutory obligation would not have arisen.[18] In its brief, the government has neither explained nor justified its non-compliance with 8 C.F.R.

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[17] Specifically, the agency failed to comply with 8 C.F.R. § 335.2(b). The regulation states: "The Service will notify applicants for naturalization to appear before a Service officer for initial examination on the naturalization application only after the Service has received a definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed." *Id.*

[18] We acknowledge the oddity that arises because of the agency's regulations. If USCIS had complied with its regulations and waited to interview Aronov until the FBI name check had been completed, his waiting time for the completion of the naturalization process might have been longer than it was here. However, this fact does not alter our legal analysis. Once USICS gave Aronov his initial interview, it had to confront the clear timing obligation imposed by Congress.

§ 335.2(b) in connection with Aronov's application or that of any other naturalization applicant.[19]

Therefore, the government's assertion that it was required to wait until Aronov's FBI name check was completed before finally adjudicating his naturalization application does not have "a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n.2. Indeed, the government's attempt to invoke an administrative policy to trump an explicit statutory command turns *Chevron* deference on its head. *See Stinson v. United States*, 508 U.S. 36, 44 (1993) ("Under *Chevron*, if a statute is unambiguous the statute governs."). In light of the 120-day statutory directive, the agency's long delay (over four times the statutory period), and the absence of any evidence that the government tried to expedite Aronov's application to comply with the statute, the government's conduct toward Aronov can only be classified as unreasonable and not substantially justified. *See Russell v. Nat'l Mediation Bd.*, 775 F.2d 1284, 1290 (5th Cir. 1985) (concluding that the government's position was not substantially justified because it breached a clear statutory mandate). Accordingly, we conclude that the district court did not abuse its discretion in holding that the gov-

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[19] Based on a recent press release issued by USCIS on April 2, 2008, there appear to be approximately 29,800 applicants whose naturalization applications were submitted to the FBI before May 2006 and whose interviews have already been completed. The agency has requested that the FBI prioritize their name checks. This is one piece of a larger, joint plan between the agency and the FBI to eliminate the backlog of name checks. The FBI also announced its intention to have processed all name checks pending for more than three years by May of this year. *See* News Release, USCIS, *USCIS and FBI Release Joint Plan to Eliminate Backlog of FBI Name Checks* (Apr. 2, 2008), *available at* http://www.uscis.gov/files/article/NameCheck_2Apr08.pdf.

ernment's pre-litigation conduct was not substantially justified.[20]

III.

For the foregoing reasons, we affirm the district court's order granting Aronov's application for attorney's fees and expenses under 28 U.S.C. § 2412(d)(1)(A). Additionally, we remand the matter to the district court so that the fee award may be recalculated to reflect the fees and expenses associated with this appeal.

So ordered.

LYNCH, Chief Judge, dissenting.

With respect, I dissent. Because the award rests on errors of law, I would reverse.

The Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A), must be construed in favor of the United States. *Ardestani v. INS*, 502 U.S. 129, 137 (1991). The Act requires a court to award fees and expenses to a prevailing party in a civil action against the United States unless the court finds that the position of the United States was substantially justified, or that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(a). The purpose of the Act was to "ensure that certain individuals . . . will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved . . . .

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[20] We also conclude that the district court did not abuse its discretion in finding that there are no "special circumstances [that] make an award [of attorney's fees] unjust." *See Schock*, 254 F.3d at 4 (quoting 28 U.S.C. § 2412(d)(1)(A)).

The Act reduces the disparity in resources between individuals . . . and the federal government." H.R. Rep. 99-120(I), at 4 (1985); *see also Scarborough v. Principi*, 541 U.S. 401, 407 (2004).[1]

I disagree with the majority's reasoning on both prongs of the EAJA analysis. This result contravenes the purposes of the Act. It imposes on United States Citizenship and Immigration Services ("USCIS") the costs of plaintiff's attorneys' fees when the agency at all times acted in accordance with the law. It also imposes such costs on the agency for attempting to resolve the matter by agreement and withdrawing the issue from the court and back to the agency so that the agency could give the relief the plaintiff sought. It also has the practical effect of draining resources from an agency which is already struggling to do its job.

I.

In my view, plaintiff is not a prevailing party. A party is prevailing for EAJA purposes if there is a material alteration in the party's position that bears a "judicial imprimatur." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604-05 (2001). In *Buckhannon*, the Supreme Court noted two specific ways in which a party can prevail: by obtaining a

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[1] *See also* 131 Cong. Rec. S9991-02, 1985 WL 715613 (daily ed. July 24, 1985) (statement of Sen. Grassley) (noting that the purpose of the Act was to prevent "meritless" government action); *id.* (statement of Sen. DeConcini) ("Before the [EAJA], small businesses, faced with unjustified Federal agency actions, were confronted with a difficult choice—to comply without question to Government regulatory enforcement which they believed improper, or challenge the Government, often at a cost exceeding the fine or penalty imposed.").

judgment on the merits or a consent decree in its favor. *Id.* at 605. Other circuits have read *Buckhannon* as allowing parties to prevail if they receive the equivalent of a consent decree or some other form of judicial relief that both affects a material alteration and bears a judicial imprimatur. *See Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 23-24 (1st Cir. 2005). This circuit has not taken a position on the issue. *Id.* at 23.

The majority focuses on the first situation, asking "whether the district court's order was the functional equivalent of a consent decree." The majority distinguishes this circuit's decision in *Smith* on the ground that *Smith* was not concerned with whether the orders in question were the equivalent of a consent decree. However, as in *Smith*, here the question of whether the order was the equivalent of a consent decree was not raised by either party, nor was that the theory on which the district court relied. Thus the issue was waived. *Id.* at 24 (the issue is waived if not presented by the parties). Instead, the parties and district court focused on the second situation: whether the district court's order put the necessary judicial imprimatur on the change in Aronov's legal status. The majority should not create arguments the parties and the district court did not use, nor do so to justify its result.

But even if the issue had not been waived, the district court's brief order remanding the case is not the equivalent of a consent decree. The order contains no statement incorporating an agreement between the parties or requiring that either party act in a particular way. All the order does is to remand the case at the request of the agency. The order here thus differs from the ones cited by the majority which other circuits have found to be the functional equivalent of consent decrees. *See, e.g., Car-*

bonell v. INS, 429 F.3d 894, 897 (9th Cir. 2005) (district court incorporated parties' stipulation into an order); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 162 (3d Cir. 2002) (district court order included detailed terms of parties' settlement); *Am. Disability Ass'n v. Chmielarz*, 289 F.3d 1315, 1317 (11th Cir. 2002) (parties' settlement was "approved, adopted, and ratified" by the district court in an order where the court expressly retained jurisdiction).

As the Supreme Court has made clear, the distinction is material: "The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order . . . ." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). It is quite clear that a "judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order." *Id.*

I would hold that the district court's order lacks the necessary judicial imprimatur to entitle Aronov to prevailing party status. Our circuit precedent in *Smith* requires that result. The majority's treatment of the order as the functional equivalent of a consent decree is inconsistent with our holding in *Smith*.[2] That case involved an administrative hearing officer's pre-hearing orders, some of which were accompanied by the threat of sanctions, which "memorialized the voluntary concessions made by [defendant] and attempted to keep the settlement process moving forward in a timely manner."

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[2] The majority also suggests that *Smith* is somehow different because the orders in question came from an administrative hearing officer rather than a district court, but *Smith* lends no support to that proposition.

Smith, 401 F.3d at 26. We held that these orders, although they imposed specific requirements on defendant, did not have sufficient judicial imprimatur to make plaintiff a prevailing party because they simply made defendant "follow through with what [defendant] had already voluntarily promised to do." *Id.* at 27. That is exactly the case here. The district court's remand permitted USCIS to follow through with its announced intention to make Aronov a citizen by November 8, 2006. USCIS had voluntarily agreed to do so before it requested the remand. As in *Smith*, the remand may have kept the process moving in a timely manner, but that is not enough to make Aronov a prevailing party. His claim under the EAJA should have stopped there.

II.

I also disagree with the majority that the government's pre-litigation position was not substantially justified.

The Supreme Court has interpreted the "substantially justified" language in the EAJA: "[A]s between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, (1988); *see also, e.g.*, *Schock v. United States*, 254 F.3d 1, 5 (1st Cir. 2001); *Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 40-41 (1st Cir. 2001). The government's position is substantially justified if required by law. *See Dantran*, 246 F.3d at 41; *United States v. One Parcel of Real Prop. With Bldgs.*, 960 F.2d 200, 208-09 (1st Cir. 1992). That was true here.

The government's position may be substantially justified even if its reasonable interpretation of its legal obligations is not ultimately affirmed by a court. *Schock*, 254 F.3d at 5. This court earlier reversed a district court for abuse of discretion in granting attorneys' fees when the government "was at least reasonable" in denying a visa because it wanted to "communicate the attitude of the United States government toward the activities of the Soviet Union," even though the visa applicant's interpretation of the underlying law ultimately prevailed. *Allende v. Baker*, 891 F.2d 7, 12, 13 (1st Cir. 1989); *see also, e.g.*, *Li v. Keisler*, 505 F.3d 913, 920 (9th Cir. 2007) ("In the absence of guidance from this court, the government's position was substantially justified."); *Bricks, Inc. v. U.S. EPA*, 426 F.3d 918, 924 (7th Cir. 2005) (although EPA was unsuccessful in its attempt to show a hydrological connection, it was still substantially justified in doing so).

Here, the government argues that USCIS's prelitigation position was substantially justified because that position was taken pursuant to federal law. In particular, the government points to two congressional enactments with which it has complied here. The first is 8 U.S.C. § 1446(a), which provides that "[b]efore a person may be naturalized, an employee of the [USCIS], or of the United States designated by the Attorney General, shall conduct a personal investigation of the person applying for naturalization." The second is language included by Congress in the 1998 Appropriations Act which has continuing effect: "[D]uring fiscal year 1998 and each fiscal year thereafter, none of the funds appropriated or otherwise made available to [USCIS] shall be used to complete adjudication of an application for naturalization unless [USCIS] has received confirmation from the Federal Bureau of Investigation that a *full criminal background check* has been completed . . . ." Dep'ts of Commerce,

Justice & State, The Judiciary & Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2448-49 (1997) (8 U.S.C. § 1446 note) (emphasis added).

The majority faults USCIS for interpreting the phrase "full criminal background check" to include a FBI name check. In the end, the award here turns on the majority's view that USCIS did not need to include the FBI name check as part of a "full" check, and that the agency's compliance with its name check policy renders its pre-litigation position here (to await the results of a requested name check) not substantially justified. But the agency's policy and its pre-litigation decision to comply with its policy were entirely reasonable.

The question before us is not whether the language in 8 U.S.C. § 1446 and the 1998 Appropriations Act specifically requires that FBI name checks be part of the background check on citizenship applicants, but whether the agency's interpretation of these statutes as requiring FBI name checks to fulfill its statutory responsibilities renders its position not substantially justified. The position is substantially justified because it was a reasonable interpretation of a legislative command[3] and that interpretation was committed to the agency's expertise.

Principles of administrative law require that courts defer to reasonable interpretations by agencies of mat-

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[3] The majority says that the government has presented no argument that Congress intended that USCIS use the FBI name check. That reasoning puts the cart before the horse. The broad language used by Congress lets the agency determine how best to perform a full criminal background check and does not limit the agency to a particular type of check. There is no evidence, textual or otherwise, that Congress intended to require the agency not to use FBI name checks.

ters committed to the agency's expertise by Congress. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *Global NAPs, Inc. v. Verizon New England, Inc.*, 505 F.3d 43, 47 (1st Cir. 2007). Agencies are also entitled to deference with respect to policy determinations. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Global NAPs*, 505 F.3d at 47; *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997) ("[P]olicy choices are for the agency, not the court, to make. Even if a reviewing court disagrees with the agency's conclusions, it cannot substitute its judgment for that of the agency."). We also note that we are describing a consistent USCIS interpretation and practice, not one adopted for purposes of the issues in this attorneys' fees litigation.

USCIS, not the majority, has the expertise to determine what should constitute a full criminal background check. The concern that applicants be adequately vetted before they become citizens has taken on added urgency in an age where terrorism is a reality and a continuing threat. That the agency came to decide in 2002 that the inclusion of FBI name checks provided better full criminal background investigations only undercuts the majority's position.

The majority holds that although a court might ordinarily defer to USCIS's policy of using FBI name checks to fulfill its statutory mandate to complete background investigations on citizenship applicants, here we cannot do so because the agency contravened 8 U.S.C. § 1447(b). The statute permits a citizenship applicant to file suit in federal district court if USCIS fails to adjudicate his application within 120 days of conducting an initial examination. The majority places great weight on this provision, treating it as a "statutory mandate" that the agency

must adjudicate an application within 120 days of an initial examination. That is plainly not what the statute says. It says only that suit may be brought within 120 days of the examination.

The provision's legislative history discusses the importance of eliminating delays but says nothing about imposing a deadline on the agency, only that after 120 days relief can be sought in federal court. *See* 135 Cong. Rec. H4539-02, 4542-43, 1989 WL 182156 (daily ed. July 31, 1989). Thus the authorization to file suit in district court is meant to encourage the agency to act fast, but that does not mean that Congress meant to impose a strict deadline on the agency. Indeed, if Congress wanted to impose a strict deadline, it could have done so directly. It is true that the agency's regulations suggest that it treat the 120-day provision as an internal deadline, *see* 8 C.F.R. § 335.3(a), but that does not create a "statutory mandate." The statute simply governs the timing of suits.[4]

Corresponding with its view that 8 U.S.C. § 1447(b) creates a mandate, the majority suggests that the government would have to make a very strong showing in order to justify missing the 120-day mark. It also faults

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[4] Additionally, the cases the majority cites for the proposition that the statute creates a deadline involved different questions. *United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004), was concerned with the question of whether exclusive jurisdiction rests in the district court after 120 days, and it provided no analysis or support for its observation that § 1447(b) "requires the INS to make a decision . . . within 120 days." *Id.* at 1161. *Walji v. Gonzales*, 500 F.3d 432 (5th Cir. 2007), involved the question of when the 120-day period begins to run and used the language "the statute is violated in situations such as [petitioner's]" in the context of supporting its conclusion that the 120-day period applies from the time the examination, and not the entire background check, is completed. *Id.* at 439.

the government for not advancing a "particularized justification" regarding Aronov and why a name check was necessary for him. In my view both rationales are wrong on their own terms and both miss the point.

Even reading the statute as imposing a deadline on the agency, the majority is nonetheless wrong because there is nothing to say that 8 U.S.C. § 1447(b) was meant to trump the agency's obligations to see that an applicant meets the requirements for citizenship or to trump the agency's mandate to conduct a full criminal background check.

Here the agency made a mistake by conducting Aronov's initial examination before it had completed his background investigation, including obtaining the results from the FBI of his name check.[5] Bureaucracies make mistakes. Given this mistake, the relevant question is whether it was unreasonable for the agency to proceed with the name check even though doing so meant that Aronov could pursue relief in federal court because of the 120-day provision.

I would hold that it was not unreasonable for USCIS to miss the 120-day mark in order to complete a name check before granting Aronov citizenship. No "particularized justification" is necessary because the entire point of conducting name checks is that the government does not know what the check will uncover. As USCIS has stated,

> Although these security checks may require a more lengthy processing time, USCIS believes that performing them is

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[5] There is no question that doing so was an error. *See* 8 C.F.R. § 335.2(b).

> essential to identifying national security and public safety concerns that would not have been uncovered by other means. This is particularly true given that in [] a few cases, the information obtained from the FBI through this process has reflected very significant issues and risks. FBI name checks disclose information to USCIS that is otherwise not available. . . . USCIS is committed to effective background checks, and thus is committed to the FBI name check.

USCIS, *Response to the Citizenship and Immigration Services Ombudsman's 2006 Report*, at 10, *available at* http://www.dhs.gov/xlibrary/assets/USCIS-Response-Ombudsman-06-Report-May-2007.pdf.

Moreover, as the majority points out, although USCIS recently eliminated the name check requirement for visa applicants in order to lessen its backlog, it has not done so for citizenship applicants for the very sensible reason that once a person is granted citizenship, that decision is not easily reversed. There is nothing unreasonable about USCIS's decision to postpone a decision on Aronov's application for citizenship until obtaining information about whether the name check revealed risks to national security or public safety, even if doing so meant that a decision could not be reached within 120 days of his examination.

Indeed, the case law also provides no basis for the award here. USCIS's pre-litigation position in this case bears no resemblance to pre-litigation positions that courts have found not to be substantially justified. In *Healey v. Leavitt*, 485 F.3d 63 (2d Cir. 2007), the Second Circuit held that the government's pre-litigation position

was not substantially justified when the government "failed to offer any justification for the Secretary's failure to require [home health agencies] to provide written notice of the termination of benefits." *Id.* at 67. Here the agency points to statutes forbidding it to grant citizenship before certain actions are taken. In *Sierra Club v. Secretary of Army*, 820 F.2d 513 (1st Cir. 1987), this court held that an agency's refusal to prepare an environmental impact statement for a project was unreasonable when there was significant evidence that the project required one and several other federal agencies had advocated for one and warned that one might be legally required. *Id.* at 516-17 (citing *Sierra Club v. Marsh*, 769 F.2d 868, 874-75 (1st Cir. 1985)). Here, the agency did not act contrary to law, but according to its reasonable interpretation of the law.

III.

The majority opinion will, in my view, have a number of unfortunate consequences. The majority holds that the government, by acting reasonably and requesting a remand so that it could grant Aronov citizenship, exposed itself to liability under the EAJA because Aronov necessarily became a prevailing party once the court granted the remand. This will discourage USCIS from acting to resolve these cases in a similarly efficient and amicable way in the future. The majority also says that it would be very difficult for the government to show that it was substantially justified in missing the 120-day mark to act on a citizenship application. The majority would thus discourage USCIS from conducting investigations of applicants that could turn up important information but would require longer than 120 days after the applicant's examination for the agency to make a final determination. Ultimately the decision could be contrary to

the interests of applicants because in the face of incomplete information, the agency might choose the safer course of denying citizenship.

I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 06-11526

ALEXANDRE ARONOV, Plaintiff,

v.

MICHAEL CHERTOFF, et al., Defendants.

Jan. 30, 2007

MEMORANDUM & ORDER RE: PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

GERTNER, District Judge.

I. INTRODUCTION

Alexandre Aronov ("Aronov") brings this motion for attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), following the disposition of his action for mandamus.

Mr. Aronov, a native of Russia and a permanent resident of the United States since August 14, 2001, applied for naturalization on May 22, 2004. He was interviewed successfully on February 14, 2005 (document # 1-3), but

was informed that a decision could not yet be made on his application pending a security background check.

A year and a half later, on August 28, 2006, when he had received no notice on his application, despite numerous inquiries, he filed an action in this Court for a writ of mandamus directing the United States Citizenship and Immigration Services ("USCIS") to act on his application (document # 1). Over a month later, the government responded with a motion to remand to the agency "so that USCIS can grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006." Defs.' Mot. to Remand (document # 3). The Court granted the motion to remand, and Aronov was sworn in as a citizen on November 8, 2006.

Aronov brought this timely motion for attorneys' fees on November 28, 2006 (document # 4); after requesting and receiving an extension of time, the government opposed it on December 20, 2006 (document # 6). Aronov responded on January 18, 2006 (document # 7).

For the reasons below, I GRANT Plaintiff's Application for Attorneys' Fees Pursuant to the Equal Access to Justice Act (document # 4) in the amount of Four Thousand, Two Hundred-Seventy And 94/100 ($ 4,270.94) Dollars.

II. DISCUSSION

Under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), a prevailing plaintiff against the United States may be entitled to attorneys' fees and costs. Once the moving plaintiff shows that he is a "prevailing party" for the purposes of the statute, the burden shifts to the government to show that its position was "substantially justified," or that there were "special cir-

cumstances." *Id.* The government here argues (1) that plaintiff is not a "prevailing party," and (2) that its own position was "substantially justified."

A. Prevailing Party Status

The definition of "prevailing party" under the EAJA was most recently set out by the Supreme Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001). In *Buckhannon*, the Supreme Court rejected the "catalyst" theory until then accepted by some Circuits, under which a party could be considered as prevailing if the filing of the legal action could be causally related to an extra-judicial action bringing about the ends sought by the plaintiff (in *Buckhannon*, a state statute challenged by the plaintiff was altered by the legislature acting independently but arguably motivated by the filing of the lawsuit). Contrary to the government's opposition, Aronov does not make a catalyst argument here.

After *Buckhannon*, prevailing party status requires (1) a "material alteration of the legal relationship of the parties;" and (2) "judicial imprimatur on the change." *Smith v. Fitchburg Public Schools*, 401 F.3d 16, 22 (1st Cir. 2005) (construing *Buckhannon*). The first requirement is undisputedly met here, as plaintiff has gone from legal permanent residency with a pending naturalization application before defendants to being a U.S. citizen. The government, however, argues that the second requirement is not met, because it acted "voluntarily" to grant plaintiff's naturalization application. This is where the instant case differs from *Buckhannon*.

In *Buckhannon*, the government acted independently to give the plaintiff what it wanted, and *then* sought dismissal. Here, the Court remanded specifically "so that

USCIS can grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006." Defs.' Mot. to Remand. This is the judicial imprimatur required by and lacking in the specific facts of *Buckhannon*. Where the government in *Buckhannon* took its conciliatory action purely voluntarily, and took on no further duties in the dismissal, the government here was granted not a dismissal, but a remand to the agency *conditional on* the granting of plaintiff's naturalization action by November 8, 2006. Had the naturalization not so occurred, the parties might very well be back in front of this Court litigating a contempt action. This is far more than a catalyst theory—it was an order of the Court.

This Court recently held similarly in *Smirnov v. Chertoff*, 06-cv-10563, 2007 U.S. Dist. LEXIS 9598 (Zobel, J.). Rather than rehash Judge Zobel's well-set-out reasoning, I refer to that decision and find that Aronov is a prevailing party for the purposes of the EAJA.

B. Substantial Justification

Once the plaintiff has established that he is a prevailing party, the burden shifts to the government to show by a preponderance of the evidence that its position was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). In general, a position is "substantially justified" if it has a "reasonable basis in both law and fact." *United States v. Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985). "[T]he statute makes clear that courts are to examine both the prelitigation actions or inaction of the agency on which the litigation is based and the litigation position of the United States . . . A position which is substantially justified at the initiation may not be justified later in the agency's continuation of the litigation." *Schock v. United States*, 254 F.3d 1, 5 (1st Cir. 2001) (citing *Dantran, Inc. v.*

United States DOL, 246 F.3d 36, 41 (1st Cir. 2001) ("The court's task in examining the government's position is not to make discrete findings as to each of these temporally distinct elements, [but to] . . . arrive at one conclusion that simultaneously encompasses and accommodates the entire civil action." (internal citation omitted)).

That the government acted relatively promptly to remand, rather than attempting to make legal arguments in support of its delay makes its litigation position appropriate and justifiable; indeed, it never took a litigation position in opposition to plaintiff's. The government's position pre-litigation, however, was not substantially justified. A year and a half passed between plaintiff's citizenship exam and the filing of this action. An applicant is entitled to a hearing by a district court after only 120 days of inaction. 8 U.S.C. § 1447(b). By the time plaintiff filed this action, the government had already taken more than four times this length of time, and would presumably have taken longer if the action had not been filed. The government's own internal policy is that FBI name-checks can be expedited under five circumstances, one of which is where an action for mandamus has been filed, Pl.'s Ex. B (documents # 4-3), suggesting that plaintiff might still be waiting on his naturalization application today if he had not filed this action.

The USCIS claims that it was unable to act on plaintiff's application sooner because the FBI did not complete plaintiff's background check until September 2006. As to this argument, I refer to Judge Zobel's apt words: "It does not matter whether blame for the delay is properly ascribed to the FBI or USCIS; rather the delay renders the government's pre-litigation position not 'substantially justified.'" *Smirnov v. Chertoff*, 06-cv-10563, 2007 U.S. Dist. LEXIS 9598; *and see, e.g.*, *Salem*

v. INS, 122 F. Supp. 2d 980, 985 (C.D. Ill. 2000); *Jeffrey v. INS*, 710 F. Supp. 486, 488 (S.D.N.Y. 1989).

As the First Circuit in *Dantran* held, the final conclusion as to justification "encompasses and accommodates" the government's positions throughout the period that affected the plaintiff. 246 F.3d at 41. Here, the bottom line is that the government unjustifiably delayed plaintiff's naturalization position, forcing him to file a mandamus action at personal expense; indeed, the government's internal expedite procedures formally establish this as one way for applications to be "expedited" (or rather, completed on time). Pl.'s Ex. B. It is not "substantially justified" for the government to force naturalization applicants to incur additional expense—and the courts to be burdened—just to have naturalization applications processed in the timely manner already supposedly guaranteed by statute (or, more correctly, to slightly mitigate the already unlawful delay in that processing). The government's position was not substantially justified, and plaintiff should be awarded attorney's fees.

C. Calculation of Fees and Costs

The statutory rate under the EAJA is $125 per hour, unless there has been an increase in the cost of living. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 795 n.4 (2002). The EAJA rate was last set in 1996; I agree with plaintiff's calculations of the cost of living increase since then. Pl.'s Ex. C1 (docket # 4-5); Pl.'s Ex. B (docket # 7-3). I also agree with plaintiff's assertion that he is entitled to fees and costs for the litigation of the fees motion. Pl.'s Reply at 11; *Commissioner, INS v. Jean*, 496 U.S. 154, 163-65 (1990).

Therefore, I GRANT Plaintiff's Application for Attorneys' Fees Pursuant to the Equal Access to Justice Act (document # 4) and DEFENDANTS ARE ORDERED TO PAY plaintiff's attorneys' fees and costs in the amount of Four Thousand, Two Hundred-Seventy And 94/100 ($ 4,270.94) Dollars.

SO ORDERED.

Supreme Court, U.S.
FILED

No. 09-325

In the Supreme Court of the United States

ALEXANDRE ARONOV, PETITIONER

v.

JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an applicant for naturalization who sought judicial review of an agency's delay in adjudicating the application, and whose application the agency thereafter granted without having been ordered to do so by a court or agreeing to do so as part of a court-approved settlement, is entitled to attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

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In the Supreme Court of the United States

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ALEXANDRE ARONOV, PETITIONER

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JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 562 F.3d 84. The opinion of the district court (Pet. App. 108a-114a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2009. On July 7, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 10, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien who seeks to become a naturalized United States citizen must file an application with the

United States Bureau of Citizenship and Immigration Services (CIS) in the Department of Homeland Security (DHS). 8 U.S.C. 1445(a); see 6 U.S.C. 271(b), 557. Once an application has been filed, CIS must conduct "a personal investigation" of the alien. 8 U.S.C. 1446(a); see 8 C.F.R. 335.1. Congress has provided that "none of the funds appropriated or otherwise made available to [CIS] shall be used to complete adjudication of an application for naturalization unless [CIS] has received confirmation from the [FBI] that a full criminal background check has been completed." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Act), Pub. L. No. 105-119, Tit. I, heading labeled Immigration and Naturalization Service, Salaries and Expenses, 111 Stat. 2448-2449 (relevant language reprinted at note following 8 U.S.C. 1446).[1]

As part of the naturalization process, Congress also has directed CIS to conduct an in-person "examination[]" of the alien himself. 8 U.S.C. 1446(b); see 8 C.F.R. 335.2(a). CIS regulations specifically provide that an "initial examination" will not be scheduled until "after [CIS] has received a definitive response from the [FBI] that a full criminal background check of an applicant has been completed." 8 C.F.R. 335.2(b). The

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[1] The funding prohibition contained in the 1998 Act refers to the former Immigration and Naturalization Service (INS). In 2003, the INS was abolished and its naturalization functions were transferred to the newly created CIS. 6 U.S.C. 271(b)(2). Congress has instructed that any reference in a statute to the former INS "shall be deemed to refer" to the entity to which the relevant function has been transferred. 6 U.S.C. 557. For ease of reference, this brief refers to CIS throughout. Accord Pet. App. 22a (describing a 2002 decision as having been made by CIS rather than INS).

regulations further provide that "[a] decision to grant or deny the application [for naturalization] shall be made at the time of the initial examination or within 120-days after the date of the initial examination." 8 C.F.R. 335.3(a); see 8 C.F.R. 335.3(b) (describing circumstances in which CIS "may continue the initial examination" and conduct "one reexamination," which generally must occur "within the 120-day period after the initial examination").

Congress has provided that an alien whose application for naturalization has been pending 120 days or more following his "examination" under Section 1446(b) "may apply to the United States district court for the district in which the applicant resides for a hearing on the matter." 8 U.S.C. 1447(b); see H.R. Rep. No. 187, 101st Cong., 1st Sess. 11-12, 14 (1989) (discussing past agency tendency to put complex applications on the "backburner"). Once such an application has been filed, Congress has further provided that the court "has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to [CIS] to determine the matter." 8 U.S.C. 1447(b).

2. This case arises from the confluence of two related situations, both of which subsequently have been addressed.

a. First, in the wake of the terrorist attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) developed a significant backlog of uncompleted name checks with respect to naturalization cases. To implement its obligation to conduct "a personal investigation," 8 U.S.C. 1446(a), including "a full criminal background check," 1998 Act 111 Stat. 2448-2449, of every applicant for naturalization, CIS has

long requested both a "fingerprint check" and a "[n]ame [c]heck" from the FBI. Pet. App. 82a, 86a. An FBI name check involves a search of FBI "files to determine whether an individual has been the subject of, or mentioned in, any FBI investigations." *Id.* at 82a. Until 2002, however, CIS limited its requests to a search of the FBI's "'main' files." *Id.* at 83a.

In 2002, CIS "began requiring more comprehensive FBI name checks," including "a search of the FBI's 'reference' files in addition to its main investigation files," and it "resubmitted 2.4 million applicant names to the FBI for these expanded checks." Pet. App. 83a. While acknowledging that these expanded name checks "may require a more lengthy processing time," CIS concluded that they were "essential to identifying national security and public safety concerns that would not have been uncovered by other means." *Id.* at 25a-26a (citation omitted). Although 99% of CIS-requested name checks continued to be completed within six months, *id.* at 85a, others took longer. As of February 2008, it was estimated that approximately 140,000 CIS name check requests had been pending with the FBI for more than six months. *Ibid.*

We also have been advised that, beginning around 2003, CIS began scheduling many naturalization examinations before having received the results of the FBI name check. In the vast majority of cases, this practice did not result in the adjudication of an alien's application for naturalization being delayed more than 120 days after the completion of the in-person examination required by Section 1446(b).[2] Because the overall

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[2] See Memorandum from Michael Aytes, Acting Associate Director, Domestic Operations, U.S. Citizenship and Immigration Services, to

volume of naturalization applicants is so large, however, a substantial number of applicants did not obtain a decision within the 120-day time frame. In April 2006, CIS announced that it would cease scheduling examinations until after it had received the result of the FBI name check. See *Aytes memo*, note 2, *supra*; see also *Walji* v. *Gonzales*, 500 F.3d 432, 439 n.7 (5th Cir. 2007) (noting change in CIS practice). As of April 2, 2008, however, the FBI had not completed name checks for approximately 29,800 naturalization applicants whose names had been submitted to the FBI before March 2006 and whose examination under Section 1446(b) had already been conducted. Pet. App. 94a n.19.

b. Congress, CIS, and the FBI have taken substantial steps to eliminate the backlog in name check requests and to ensure that it will not reoccur. In December 2007, Congress appropriated $20 million to CIS "to address backlogs of security checks associated with pending applications and petitions," contingent on the submission of "a plan to eliminate the backlog of security checks that establishes information sharing protocols to ensure United States Citizenship and Immigration Services has the information it needs to carry out its mission." Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Tit. IV, 121 Stat. 2067; see Pet. App. 22a-23a. In April 2008, CIS and the FBI announced a joint plan to eliminate the backlog of pending name checks by June 2009, and to ensure that, going forward, 98% of name checks would be processed within 30 days and that the

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Regional Directors et al., *Background Checks and Naturalization Interview Scheduling* (Apr. 25, 2006) (*Aytes memo*), *reprinted as* Attach. to 83 No. 21 Interpreter Releases 988, 989 (Thomson/West May 22, 2006).

remaining 2% would be processed within 90 days.[3] By August 2008, the number of pending name checks had dropped from 270,000 to 95,000. *Id.* at 20a n.16. In June 2009, CIS and the FBI announced that they had successfully eliminated the backlog.[4]

3. Petitioner is a native of Russia who filed an application for naturalization in May 2004. Pet. App. 61a. On February 14, 2005—before the FBI had completed petitioner's name check—CIS conducted its examination of petitioner pursuant to Section 1446(b). *Id.* at 61a-62a. At that time, petitioner was told that his application for naturalization could not be approved until additional security checks were concluded. *Id.* at 62a. On March 23, 2006, petitioner received a letter from CIS informing him that his application was still being processed but that additional review was required. *Ibid.* The March 23, 2006, letter also advised petitioner that he should contact CIS if he did not receive a decision within six months. *Ibid.*; see C.A. App. 62 (reproducing letter).

On August 28, 2006—approximately five months after receiving CIS's letter and 18 months after his examination by CIS—petitioner filed suit in federal district court pursuant to Section 1447(b). Pet. App. 3a. As relief, petitioner sought an order "[a]djudicating [petitioner's] Application for Naturalization" or

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[3] U.S. Citizenship & Immigration Services, *News Release: USCIS and FBI Release Joint Plan to Eliminate Backlog of FBI Name Checks* (Apr. 2, 2008) <http://tinyurl.com/ylps8js>; see Pet. App. 20a n.16.

[4] U.S. Citizenship & Immigration Services, *News Release: USCIS, FBI Eliminate National Name Check Backlog* (June 22, 2009) (*June 22, 2009 News Release*) <http://tinyurl.com/uscisbacklog>.

"[r]equiring [respondents] to adjudicate [petitioner's] application." C.A. App. 57.

Respondents did not file an answer or otherwise respond to petitioner's complaint. Pet. App. 5a. Instead, on October 6, 2006, the parties filed a joint motion "to remand this matter to [CIS], so that [it] can grant [petitioner's] application for naturalization, and schedule [petitioner's] oath ceremony for no later than November 8, 2006." *Id.* at 62a-63a. The joint motion recited that, since the filing of the complaint, CIS had "completed its review of [petitioner's] application for naturalization." *Id.* at 62a. The joint motion further stated that, "if jurisdiction is returned to the agency, [CIS] would grant the application and schedule [petitioner's] oath ceremony for no later than November 8, 2006." *Ibid.* The joint motion did not contain any statements about the history of petitioner's application for naturalization, any impetus for CIS's completion of its review of petitioner's application, or any negotiations between the parties that led to the filing of the joint motion. *Id.* at 5a.[5] The district court did not conduct a hearing about

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[5] When petitioner filed suit, CIS had a written policy stating that it would ask the FBI to expedite the name check process in various circumstances, one of which was "[w]rit of Mandamus—lawsuit pending in Federal Court." C.A. App. 45; see Pet. App. 27a & n.19. In February 2007, CIS announced that it was "no longer routinely requesting the FBI to expedite a name check when the only reason is that a mandamus (or other federal court petition) is filed in the case." United States Citizenship & Immigration Services, *USCIS Update: USCIS Clarifies Criteria to Expedite FBI Name Check* (Feb. 20, 2007) <http://tinyurl.com/uscispolicy>. Under current policy, CIS may request expedited processing if a case meets one of four criteria, including "[m]ilitary [d]eployment," "[a]ge-out cases not covered under the *Child Status Protection Act*, and applications affected by sunset provisions such as diversity visas," "[s]ignificant and compelling

whether to grant the joint motion. *Ibid.* Instead, on October 12, 2006, the district court entered an electronic order that stated, in its entirety: "Electronic ORDER granting [3] Joint Motion to Remand to U.S. Citizenship and Immigration Services." *Id.* at 5a-6a. On November 8, 2006, petitioner was sworn in as a United States citizen. *Id.* at 64a.

4. On November 28, 2006, petitioner filed an application for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A). EAJA authorizes a court to award a reasonable attorneys' fee to a qualifying "prevailing party" in a "civil action" brought by or against the United States unless the position taken by the United States in the proceeding at issue "was substantially justified" or "special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A).

The district court granted petitioner's application and awarded $4270.94 in fees. Pet. App. 108a-114a. The district court acknowledged that this Court's decision in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) (*Buckhannon*), "rejected the 'catalyst' theory * * *, under which a party could be considered as prevailing if the filing of the legal action could be causally related to an extra-judicial action bringing about the ends sought by the plaintiff." Pet. App. 110a. The district court concluded, however, that petitioner obtained the sort of "judicial imprimatur" required by *Buckhannon* because here the government "was granted not a dismissal, but a remand to the agency *conditional*

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reasons, such as critical medical conditions," and "[l]oss of social security benefits or other subsistence." *Ibid.*

on the granting of [petitioner's] naturalization action by November 8, 2006." *Id.* at 111a.

The district court also determined that the government's "position pre-litigation" had not been substantially justified. Pet. App. 112a. The court observed that Section 1447(b) provides that "[a]n applicant is entitled to a hearing in district court" if his application for naturalization has not been resolved within 120 days of his examination by CIS, and it stated that "[b]y the time [petitioner] filed this action, the government had already taken more than four times this length of time, and would presumably have taken longer if the action had not been filed." *Ibid.* The district court rejected CIS's claim that its position was substantially justified because CIS "was unable to act on [petitioner's] application sooner because the FBI did not complete [petitioner's] background check until September 2006." *Ibid.* The court stated that it did "not matter whether blame for the delay is properly ascribed to the FBI or [CIS]." *Ibid.* (citation omitted). Pointing to CIS's then-existing policy of expediting name checks for applicants who had filed suit, see note 5, *supra*, the court also stated that "[i]t is not 'substantially justified' for the government to force naturalization applicants to incur additional expense—and the courts to be burdened—just to have naturalization applications processed in the timely manner already supposedly guaranteed by statute." Pet. App. 113a.

5. The government appealed. A divided panel of the court of appeals initially affirmed the district court's fee award, Pet. App. 60a-107a, but the full court granted rehearing en banc and reversed the district court's award of fees, *id.* at 1a-59a.

a. The en banc court concluded that petitioner was not entitled to fees for two independent reasons.

i. As a threshold matter, the en banc court held that petitioner was not a prevailing party. Pet. App. 8a-18a. The court observed that "*Buckhannon* explicitly identified two and only two situations which meet the judicial imprimatur requirement: where a plaintiff has 'received a judgment on the merits[]' * * * or 'obtained a court-ordered consent decree.'" *Id.* at 9a-10a (quoting *Buckhannon*, 532 U.S. at 605). The court agreed with various other circuits, however, "that the formal label of 'consent decree' need not be attached," stating that the appropriate inquiry is "whether the order contains the sort of judicial involvement and actions inherent in a 'court-ordered' consent decree." *Id.* at 10a-11a.

The court of appeals concluded that the district court's remand order in this case "lacked all the core indicia of a consent decree." Pet. App. 14a-15a. First, the district court's remand order "did not order [CIS] to do anything." *Id.* at 15a. Second, "[t]he [district] court made no evaluation at all of the merits of the case," and "[t]here was no basis on which the court could evaluate the merits because [CIS] never filed an answer, never raised the potential defenses it had, and there never was any engagement of any sort on the merits for the district court to consider." *Ibid.* Third, the district court's remand order "did not contain provisions for future enforcement typical of consent decrees," but rather "merely returned jurisdiction to the agency to allow the parties to carry out their agreement." *Id.* at 16a. The en banc court also determined that it "need not resolve * * * whether [CIS] could have acted without the remand," because an "order remanding to the agency is

alone not enough to establish the needed imprimatur." *Id.* at 18a.

The en banc majority rejected the dissenting judges' view that, in granting the joint motion to remand, the district court had "essentially issued an injunction requiring [CIS] to" administer the oath of citizenship to petitioner by November 8, 2006. Pet. App. 16a n.13. This view, the en banc court emphasized, was "not based on the actual October 12, 2006 remand order, but on the district court's later characterization of the order." *Ibid.* "On its face," the majority observed, "the [remand] order was unambiguous and lacked any provision mandating [CIS] to act or expressly retaining jurisdiction to force the government to act." *Ibid.* The court of appeals agreed that "the allowance of motions for remand after litigation may meet the EAJA criteria for judicial imprimatur," but it concluded that the remand order at issue here "did not" satisfy those criteria. *Ibid.*

The en banc court also stated that the case before it was "factually distinguishable from the Tenth Circuit's recent decision in *Al-Maleki v. Holder*, 558 F.3d 1200 (10th Cir. 2009)." Pet. App. 15a n.11. The court observed that *Al-Maleki* involved a situation where the district court "denied the government's initial motion for an unrestricted remand after a hearing, ordered the government to file an answer, accepted the representations in the answer, then granted a joint motion to remand, and entered an order expressly directing [CIS] to administer the oath of citizenship to the applicant." *Ibid.* The en banc court further observed that, in *Al-Maleki*, "[t]he court found an order directing the agency to act was required because, as the court noted, 'at the time the district court's order was entered, [CIS] had not yet naturalized Al-Maleki or made a binding

commitment to do so.'" *Ibid.* (quoting *Al-Maleki* v. *Holder*, 558 F.3d 1200, 1205 (10th Cir. 2009)). Here, in contrast, the en banc court explained that "there were no such proceedings," "[n]o such order was entered," and "the [district court] only remanded to the agency for it to act on its promise to grant citizenship." *Id.* at 15a-16a n.12.

ii. The en banc court also held that "[e]ven if" petitioner were a prevailing party, he was not entitled to fees under EAJA because the government's position was substantially justified. Pet. App. 18a-28a. The court concluded that Congress's decision not to define the precise contours of the "full criminal background check" mandated by the 1998 Act constituted a delegation to CIS to decide, "with its particular expertise," the precise form and content of the required check. *Id.* at 22a. The en banc court stated that CIS's determination "that the inclusion of FBI name checks provided better full criminal background checks" was "within [CIS's] legal authority and * * * reasonable," *id.* at 22a-23a, and that, "[o]nce [CIS] made that choice, it acted under the requirements of law—its own regulations—in awaiting the full background check" before acting on petitioner's application for naturalization, *id.* at 24a.

The en banc court disagreed with petitioner's assertion that the government's position was not substantially justified because 8 U.S.C. 1447(b) requires CIS "to complete all checks within 120 days." Pet. App. 24a. The court observed that the "literal[]" text of Section 1447(b) "does not command [CIS] to act within the deadline," but rather provides that "if the agency fails to make a determination of citizenship within the 120-day period after the interview," the applicant may seek relief in court. *Ibid.* Accordingly, the en banc

court stated that "the agency could reasonably believe it does not violate the statute by not acting within 120 days." *Ibid.* The court also stated that the regulation requiring that naturalization applications be acted upon within 120 days of the examination mandated by Section 1446(b) must "be read in the context of the regulations defining when" that examination "may take place," and it reiterated its earlier observation that petitioner's initial examination had been "premature" under the regulations. *Id.* at 25a.

The en banc court also concluded that, even if CIS was "wrong as to the requirement for FBI name checks and as to whether the statute and/or regulation imposed a flat 120-day deadline, its views were still substantially justified." Pet. App. 25a. The court explained that because "[n]either the Supreme Court nor" it previously had addressed those questions, this case "[a]t most" involved "a situation in which an agency has imposed regulatory requirements on itself that are in tension, and the solution it chose, to bend the 120-day rule because the background check was not completed, is entirely reasonable." *Ibid.* The en banc court also stated that, "[i]ndependently, the choice by [CIS] to favor national security in requiring a full check of the background of a citizenship applicant over a self-imposed 120-day deadline * * * cannot be unreasonable." *Ibid.*

The en banc majority likewise rejected petitioner's contention that CIS's former policy of asking the FBI to expedite a name check if an applicant filed a mandamus action or fell within certain other categories (see note 5, *supra*) had unreasonably "created an incentive system which require[d] candidates to sue to get priority in having FBI name checks done." Pet. App. 27a. The

court stated that this argument failed because it "assume[d] there is some right in the applicant to priority" notwithstanding the lack of any "statutory right * * * to jump the queue." *Ibid.* The court also determined that "the agency's choice to give priorities to the categories it selected was a rational allocation of resources, which must be spent on litigation if the agency does not work out a voluntary solution." *Id.* at 28a-29a (footnotes omitted).

Finally, the en banc court also distinguished *Al-Maleki* with respect to the substantial-justification issue. Pet. App. 28a n.21. In *Al-Maleki*, the en banc court explained, "[t]he *only* justification presented by the government * * * was that it was unable, at th[e] [relevant] point, to request expedition" of the alien's name check, and the Tenth Circuit concluded that assertion "was factually untrue." *Ibid.* (emphasis added). Accordingly, the en banc court stated that the *Al-Maleki* panel "was not faced with the justifications offered to us." *Ibid.*

b. Judge Torruella dissented. Pet. App. 29a-32a. In his view, petitioner was a prevailing party because "the remand order effectively mandated the relief [petitioner] sought and changed the jurisdictional landscape such that that relief could be awarded." *Id.* at 30a-31a. Judge Torruella also reasoned that the government's position had not been substantially justified because CIS violated its own "clear rule [that] decisions must be made within 120 days of the initial examination." *Id.* at 31a.

Judge Lipez also filed a dissenting opinion, which Judge Torruella joined. Pet. App. 32a-59a. In his view, the district court's remand order "incorporated [CIS]'s representation that it would naturalize [petitioner] by a

certain date" and thus "provided a continuing basis for enforcing the agreement if [CIS] did not comply with its representations to the court." *Id.* at 48a. Judge Lipez also concluded that "[t]he law does not require that the district court state explicitly that it has evaluated the fairness, reasonableness, and adequacy of a proposed consent decree," and that "[t]he record in this simple case [was] ample" to permit the district court "to make that evaluation." *Ibid.* Accordingly, Judge Lipez reasoned that "the [district] court's remand order was the functional equivalent of a consent degree, and [petitioner] was a prevailing party." *Id.* at 48a-49a.

Judge Lipez also concluded that the government's position had not been substantially justified. Pet. App. 49a-58a. In his view, Section 1447(b) imposes a 120-day "deadline" on processing applications for naturalization, *ibid.*, and he cited CIS's "*regular practice* to violate its own regulations by examining candidates before receiving [name check] results," *id.* at 54a. Judge Lipez acknowledged that, "if [CIS] had complied with its regulations and waited to interview [petitioner] until [after] the FBI name check had been completed, his waiting time for the completion of the naturalization process might have been longer than it was here." *Id.* at 54a n.13. In Judge Lipez's view, however, that fact did "not alter the legal analysis" because "[o]nce [CIS] gave [petitioner] his initial interview, it had to confront the clear timing obligation imposed by Congress." *Ibid.* Judge Lipez also expressed the view that this case did not involve a "challenge to the general validity of the name-check policy" or a suggestion that petitioner's "naturalization application should have been approved without the security check that the agency deemed necessary." *Id.* at 55a. Instead, he continued, CIS's

former policy of expediting name checks for applicants who filed lawsuits "should not be cost-free in light of the additional expense it impose[d] on the applicant for naturalization," and the government had "advanced no * * * particularized justification" that was "grounded in the facts of [this] particular case for not complying with the 120-day statutory requirement." *Id.* at 56a.

ARGUMENT

Petitioner contends (Pet. 12-31) that the court of appeals erred in concluding that he was not entitled to attorneys' fees under the EAJA. That claim does not merit further review. The court of appeals' decision rests on two independent holdings—*i.e.*, that petitioner was not a prevailing party and that, even if he was, the government's position was substantially justified. Accordingly, petitioner could not obtain relief unless this Court were to grant review and disagree with the court of appeals with respect to both of those holdings. Those holdings, however, are both correct. In addition, the court of appeals' decision in this case does not conflict with any decision of another court of appeals, and this case would be a poor vehicle for addressing the substantial-justification issue because of the minimal factual record. Finally, the issues in this case are of diminishing importance because of recent steps by Congress, CIS, and the FBI to address the substantial but temporary backlog of naturalization applications that gave rise to it. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals' decision is correct.

a. The court of appeals properly held that petitioner "is not a prevailing party under the [remand] order entered by the district court." Pet. App. 8a. As the court of appeals explained, the district court "made no

evaluation at all of the merits of the controversy" because "there never was an engagement of any sort on the merits for the district court to consider." *Id.* at 15a. In addition, the district court's one-line electronic order granting the parties' joint motion to remand the case to CIS "did not order [CIS] to do anything," "did not resolve a dispute between the parties," and "did not contain provisions for future enforcement typical of consent decrees." *Id.* at 15a-16a. Accordingly, the district court's remand order "did not meet the judicial imprimatur standards for a prevailing party." *Id.* at 14a.

Petitioner errs in asserting that the district court's remand order provided a "judicial[] sanction[]" for a change in the parties' legal relationship on the theory that, but-for the remand order, CIS would have "lack[ed] jurisdiction to act on [petitioner's] application for naturalization." Pet. 22 (citation omitted). As the court of appeals noted (see Pet. App. 18a n.14), the lower courts have reached different conclusions about whether the filing of an action under Section 1447(b) divests CIS of authority to grant an application for naturalization absent a remand by the district court. The court of appeals correctly determined that it was unnecessary to resolve that question here, however, because an "order remanding to the agency is alone not enough to establish the needed imprimatur" under *Buckhannon*. *Id.* at 18a.[6]

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[6] Petitioner is mistaken when he asserts (at 24) that this conclusion "is in serious tension with" *Shalala* v. *Schaefer*, 509 U.S. 292 (1993). Unlike this case, *Schaefer* did not involve an "order remanding to the agency * * * *alone*." Pet. App. 18a (emphasis added). Rather, *Schaefer* involved an order that "revers[ed] the decision of the Secretary [of Health and Human Services] . . . [and] remand[ed] the cause for a rehearing." 509 U.S. at 294 (third set of brackets in original)

Petitioner likewise errs in contending that "the only plausible understanding of the remand order in this case is that it necessarily incorporated the government's commitment to act upon and grant petitioner's application for naturalization by a specified date." Pet. 23. The court of appeals correctly rejected that claim, which "is not based on the actual October 12, 2006 remand order, but on the district court's later characterization of the order." Pet. App. 16a n.13. In any event, "[w]hether an order contains a sufficient judicial imprimatur can only be determined by determining the content of the order against the entire context before the court," *id.* at 14a, and a case-specific disagreement about the proper interpretation of the district court's one-sentence remand order does not merit this Court's review.

b. The court of appeals also correctly held that petitioner's fee-request fails for the independent reason that the government's position was "substantially justified." Pet. App. 18a.

Petitioner first argues (at 25-26) that CIS "could have" deferred conducting his examination under Section 1446(b) until after it received the results of the FBI name check and then "act[ed] on petitioner's application promptly after his examination."[7] As the court of appeals recognized, however, the error with respect to the timing of petitioner's examination "was harmless and accrued to [petitioner's] benefit," because it meant

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(quoting 42 U.S.C. 405(g)); see *id.* at 304 (describing the order in question as "a judgment *for* the plaintiff").

[7] Petitioner does not challenge (see Pet. 25) the reasonableness of CIS's conclusion in 2002 that a comprehensive FBI name check is an essential part of the "full criminal background check" that Congress mandated in the 1998 Act, 111 Stat. 2448.

that petitioner "was immediately eligible for citizenship upon successful completion of the FBI background check and, under the literal terms of § 1447(d), was able to bring suit if the agency did not act on his application within 120 days" Pet. App. 5a (footnote omitted); see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659–660 (2007) ("In administrative law, * * * there is a harmless error rule.") (citation omitted).

Petitioner also errs in contending (at 26) that the government's position was not substantially justified because, once CIS conducted a premature initial examination, "there is no reason to believe that" CIS could not have completed processing his application before the expiration of the 120-day period. In particular, petitioner asserts (*ibid.*) that CIS "could have sought to expedite petitioner's background investigation," and he points to CIS's former policy of "expediting a background investigation * * * after an applicant filed suit to challenge the delay in processing his application." See note 5, *supra*.

As explained above, see pp. 3-4, *supra*, developments following the terrorist attacks of September 11, 2001, created an enormous backlog of name check requests at the FBI. Petitioner does not challenge the court of appeals' conclusion that he personally had no special "right * * * to priority" or "to jump the queue" of applicants who were caught up in that backlog. Pet. App. 27a. Under the circumstances, it was necessary for CIS "to give priorit[y] to" certain categories of name check requests, and the categories it selected reflect "a rational allocation of resources." *Ibid.*; see note 5, *supra* (listing categories). In particular, CIS's (subsequently repealed) policy of expediting name checks in cases in

which an applicant had filed suit pursuant to Section 1447(b) represented a sensible use of scarce agency resources that otherwise would have been "spent on litigation if the agency d[id] not work out a voluntary solution." Pet. App. 28a. In any event, petitioner's argument that he is entitled to fees *because* of that policy would have the perverse effect of "impos[ing] EAJA fees" on CIS for having "benefitted an applicant by giving priority to the applicant's name check." *Id.* at 27a.

2. The court of appeals' decision does not conflict with the decisions of any other court of appeals.

a. Petitioner's principal contention (at 13-14) is that the court of appeals' decision in this case conflicts with the Tenth Circuit's decision in *Al-Maleki* v. *Holder*, 558 F.3d 1200 (2009). But the court of appeal specifically distinguished *Al-Maleki* with respect to both the prevailing-party and substantial-justification issues. See Pet. App. 15a n.12 (prevailing party); *id.* at 28a n.21 (substantial justification); see also pp. 11, 14, *supra*. In addition, although the court of appeals stated that its identification of various distinctions between the case before it and the situation presented in *Al-Maleki* "should not be taken as agreement with the panel decision of the Tenth Circuit on * * * any * * * point," *id.* at 16a n.12, the court of appeals did not specifically identify any point on which it disagreed with the *Al-Maleki* panel and it did not state that it would have reached a different result in *Al-Maleki* itself. At the same time, the Tenth Circuit has not confronted a case involving the factual circumstances presented in this case. Accordingly, notwithstanding petitioner's claim (Pet. 16) that the distinctions between *Al-Maleki* and this case cited by the court of appeals are

"formalistic and ultimately illusory," there currently is no ripe conflict between the First and Tenth Circuits.[8]

b. Petitioner contends (Pet. 18) that "[t]his case also implicates broader uncertainty among the courts of appeals as to when a court order renders a party 'prevailing' for purposes of EAJA." Even assuming that the differences in verbal formulations adopted by the courts of appeals for describing the test for prevailing-party status translate into differences in real-world outcomes, there are at least two reasons why this case would not be an appropriate vehicle for resolving any disagreement that exists. First, the court of appeals' decision in this case also rests on the independent ground that petitioner was not entitled to fees because the government's conduct was substantially justified. Pet. App. 18a (stating that "[e]ven if" petitioner were a prevailing party, "the remaining condition for an EAJA award has not been met"). Second, the court of appeals specifically concluded that the remand order at issue in this case "would not create prevailing party status under the tests adopted by any of the circuits." *Id.* at 17a.

3. As noted previously, petitioner could not obtain relief unless this Court were to grant review with respect to both the prevailing-party and substantial-

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[8] Petitioner also asserts that the Tenth Circuit's decision in *Al-Maleki* conflicts with "unpublished decisions of the Fifth and Ninth Circuits." Pet. 14. Any such conflict, however, would not implicate this case. In any event, a conflict between a precedential decision from one circuit and non-precedential decisions from other circuits would not warrant this Court's review.

Petitioner also suggests (Pet. 17) that "the federal district courts are in complete disarray as to the availability of fees under EAJA for applicants who have brought suit, and obtained relief, under Section 1447(b)." Any such "disarray" can and should be addressed by the courts of appeals in the first instance.

justification issues. This case, however, would be a poor vehicle with respect to the latter issue because of the minimal factual record that has been compiled with respect to it. When the district court ruled on petitioner's application for attorneys' fees, it had before it only a single page of evidence involving the nature of, and reasons for, CIS's conduct—a January 2005 Notice in which CIS set forth its then-effective "*FBI Name Check Expedite Criteria.*" See C.A. App. 45. Since then, the court of appeals and the parties have cited numerous extra-record sources to illuminate CIS processes and policies, the changes made to those processes and policies over time, and the nature and extent of the backlog in processing applications for naturalization. See, *e.g.*, Pet. 3-4, 26 n.7, 28; Pet. App. 20a n.16, 22a & n.17, 23a n.18, 25a-27a, 82a-86a, 94a n.19. To the extent that the proper resolution of the substantial-justification issue implicates disagreements about what happened or why, however, it would be more appropriate for this Court to resolve that issue in a case with a factual record that has been fully developed in district court.

4. This Court's review also is unwarranted because the issues in this cases are of little continuing importance. By April 2006, CIS ceased scheduling an alien's initial examination under Section 1446(b) until the results of the FBI name check have been received. See p. 5, *supra*. Because the 120-day period set forth in Section 1447(b) does not begin to run until "the date on which the examination is conducted," 8 U.S.C. 1447(b), this change—which occurred more than three years ago—has now corrected the problem that gave rise to this and similar cases.

In addition, a case may be brought under Section 1447(b) only if CIS has "fail[ed] to make a determi-

nation" on an alien's request for naturalization. 8 U.S.C. 1447(b). As of June 2009, however, CIS and the FBI had eliminated the backlog in processing times that gave rise to this and many similar suits. See p. 6, *supra*. Accordingly, it is unlikely that there will be many additional filing under Section 1447(b) arising from name check delays.[9] Finally, it is likely that a great many of the cases that have been brought under Section 1447(b) either already have or would reach final judgment before this Court could issue any decision in this case.

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[9] Petitioner identifies four new cases that have been filed since CIS and the FBI announced the elimination of the backlog in conducting name checks. See Pet. 29 n.9. That announcement stated, however, that "the adjudication of cases that were previously delayed as a result of a pending FBI name check request may now include updating fingerprint results, scheduling interviews, requesting additional evidence and other reviews." *June 22, 2009 News Release*. Accordingly, the fact that some new cases have been filed since June 2009 provides no support for petitioner's broad speculation (at 28) that "there is no reason to believe that [CIS] will suddenly start processing all naturalization applications in a timely manner." In addition, the government's statement to the court of appeals that "[t]his case presents questions of great legal and practical significance," see Pet. 27 (quoting Gov't C.A. Supp. Br. 1) was made six months before CIS and the FBI announced the elimination of the backlog that gave rise to this suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-325

In the Supreme Court of the United States

ALEXANDRE ARONOV, PETITIONER

v.

JANET NAPOLITANO,
SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Twelve months ago, the government told the First Circuit that "[t]his case presents questions of great legal and practical significance." Gov't C.A. Supp. Br. 1. But having sought rehearing en banc and persuaded the en banc First Circuit to hold (by a bare 3-2 margin) that petitioner was not entitled to attorney's fees under the Equal Access to Justice Act (EAJA), the government now argues that this case no longer warrants further review because "the issues in this case[] are of little continuing importance." Br. in Opp. 22.

If anything, however, this case is an even stronger candidate for further review now than it was when the government sought rehearing in the First Circuit. Since then, the Tenth Circuit held in *Al-Maleki* v. *Holder*, 558

F.3d 1200 (2009), that a similarly situated applicant for naturalization, who had brought suit under 8 U.S.C. 1447(b) and obtained a court-ordered remand, was entitled to attorney's fees under EAJA. The en banc First Circuit's subsequent decision directly conflicts with *Al-Maleki*. In its brief in opposition, the government offers only the flimsiest of rationales for reconciling those decisions, and it does not dispute that the question presented has frequently recurred in the lower courts. The only plausible explanation for the government's change of heart, then, is that it is currently on the winning side of this case, rather than the losing one. Because the government was correct when it originally asserted that the case presents an issue of "exceptional importance," Gov't C.A. Pet. for Reh'rg 9, and because this case now implicates a clear circuit conflict, the petition for certiorari should be granted.

A. The Decision Below Conflicts With A Decision Of The Tenth Circuit And Implicates Broader Disarray Among The Lower Courts

1. The government principally contends that there "currently is no ripe conflict between the First and Tenth Circuits" because "the Tenth Circuit has not confronted a case involving the factual circumstances presented in this case." Br. in Opp. 20, 21. That contention lacks merit.

The government does not specify what it believes to be the relevant distinctions in the "factual circumstances" of the two cases. For its part, the First Circuit primarily attempted to distinguish *Al-Maleki* on the ground that the district court's order in this case, unlike the order in *Al-Maleki*, remanded the case to USCIS without expressly directing it to act on the application for naturalization by a specified date. See Pet. App. 15a n.12. That distinction, however, "elevates form over

function," because the order in this case similarly, if implicitly, incorporated the government's agreement to act on the naturalization application by a date certain. *Id.* at 31a n.3 (Torruella, J., dissenting). Indeed, that is how the order was understood by the district court itself. See *id.* at 111a; cf. *Perez* v. *Westchester County Dep't of Corrections*, 587 F.3d 143, 153 n.8 (2d Cir. 2009) (explaining that the prevailing-party inquiry "is in some regard about the intent of the district court").

Notably, the government does not argue that the distinction in the form of the remand order is legally relevant. And for good reason: in either form, the remand order (unlike an order of dismissal) provides a type of relief expressly contemplated by Section 1447(b), and thus works the "judicially sanctioned change in the parties' legal relationship" necessary to confer prevailing-party status on the applicant under EAJA. *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).[1]

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[1] Indeed, because a remand order provides a form of relief expressly contemplated by Section 1447(b), it constitutes the equivalent of an "enforceable judgment on the merits," *Buckhannon*, 532 U.S. at 604, and confers prevailing-party status for that reason as well. See *Shalala* v. *Schaefer*, 509 U.S. 292, 300-302 (1993). The government suggests (Br. in Opp. 17 n.6) that *Schaefer* is distinguishable because it involved an order that both reversed a prior agency determination and remanded to the agency for further consideration. That is a distinction without a difference, however, because the statute at issue here, unlike the specific statute at issue in *Schaefer*, expressly provides for a simple remand as a form of relief in the plaintiff's favor. In addition, every court of appeals to have addressed the issue has held that a court considering a Section 1447(b) action must order a remand (or otherwise terminate the action) before USCIS can act on the naturalization application. See *Bustamante* v. *Napolitano*, 582 F.3d 403, 404 (2d Cir. 2009); Pet. 22 (citing other cases).

Put differently, there can be no real doubt that, if the Tenth Circuit were presented with the order in this case, it would still reach the same result and award fees. In *Al-Maleki*, the Tenth Circuit explained that the order at issue there did not merely "dismiss[] the case because there [was] no longer a dispute before [the court]." 558 F.3d at 1205 (alterations in original; citation omitted). Instead, the order "placed the weight of judicial authority behind USCIS's stipulation that [the applicant] was entitled to be naturalized," and, as such, "provided the judicial imprimatur which is indispensable to the prevailing party determination." *Id.* at 1206. That reasoning would apply equally to an order like the one at issue here, which similarly, if implicitly, incorporates the government's agreement to act on the naturalization application by a specified date. It is therefore unsurprising that, after identifying the foregoing factual distinction, the First Circuit took pains to emphasize that its decision "should not be taken as agreement with the panel decision of the Tenth Circuit [in *Al-Maleki*]." Pet. App. 16a n.12. Because the order in this case is functionally indistinguishable from the order in *Al-Maleki*, the two decisions cannot be reconciled, and the resulting conflict warrants the Court's review.

2. The government does not dispute that the federal district courts, reflecting the conflict between the First and Tenth Circuits, are in disarray as to the availability of fees under EAJA for applicants who have brought suit, and obtained relief, under Section 1447(b). Instead, the government merely contends that "[a]ny such 'disarray' can and should be addressed by the courts of appeals in the first instance." Br. in Opp. 21 n.8.

Just a few months ago, however, the government successfully argued that this Court should grant review on another issue concerning the interpretation of EAJA

because, "[i]n addition to producing a circuit split," the issue had "spawned multiple internal conflicts within district courts." Pet. at 16, *Astrue* v. *Ratliff*, cert. granted, No. 08-1322 (Sept. 30, 2009). The same rationale applies here in spades: there have been at least 50 cases *since 2007* in which district courts have considered whether to award EAJA fees in Section 1447(b) actions, with courts adopting a variety of different rationales in disposing of those cases. See Pet. 17-18. Moreover, the government does not dispute that, despite the large number of cases in the district courts, relatively few cases have reached, or will reach, the level of the courts of appeals—much less this Court—because the amount of money sought in the typical EAJA request in a Section 1447(b) case is relatively modest (whereas the cost of an unsuccessful appeal is relatively large). See Pet. 30.[2] As the government correctly argued in *Astrue*, therefore, the disarray in the district courts provides an additional justification for further review.

3. In addition, the government seemingly concedes that, in the wake of this Court's decision in *Buckhannon*, there is broader uncertainty among the courts of appeals as to "how much or what kind of judicial imprimatur must be stamped on [a court order] before it renders a party 'prevailing.'" *Utility Automation 2000, Inc.* v. *Choctawhatchee Electric Cooperative, Inc.*, 298 F.3d 1238, 1250 (11th Cir. 2002) (Marcus, J., specially concurring); see Br. in Opp. 21 (recognizing the existence of

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[2] The docketing fee alone for a federal appeal is now $450. See Administrative Office of the U.S. Courts, Court of Appeals Miscellaneous Fee Schedule (Jan. 1, 2009) <www.uscourts.gov/fedcourtfees/courtappealsfee_january2009.pdf>. By way of comparison, that is more than 10% of the original fee award in this case. See Pet. App. 114a.

"differences in verbal formulations adopted by the courts of appeals for describing the test for prevailing-party status"). The government merely notes that "the court of appeals specifically concluded that the remand order at issue in this case 'would not create prevailing party status under the tests adopted by any of the circuits.'" *Ibid.* (quoting Pet. App. 17a).

That unelaborated conclusion, however, was simply incorrect. At a minimum, petitioner would plainly qualify as a prevailing party not only under the Tenth Circuit's standard in *Al-Maleki*, but also under the Ninth Circuit's standard, which requires only that the court order at issue provide "some judicial sanction" of the parties' agreement. *P.N.* v. *Seattle School District No. 1*, 474 F.3d 1165, 1173 (2007). By contrast, it is uncertain whether petitioner would qualify under the stricter or more formalistic approaches of other circuits. See Pet. 19-20. This case therefore presents the Court with an ideal opportunity not only to resolve the circuit conflict in the specific context presented here, but also more broadly to clarify what type of order is sufficient to render a party "prevailing" under EAJA and other fee-shifting statutes.

B. This Case Is An Ideal Vehicle For Consideration Of The Question Presented

1. The government suggests (Br. in Opp. 16, 21-22) that this case is a poor vehicle for further review because the Court would have to consider not only whether petitioner was a prevailing party for purposes of EAJA, but also whether the government's position was substantially justified.

Far from constituting a reason for denying review in this case, however, the First Circuit's error with regard to the substantial-justification requirement constitutes

an additional reason for granting it—as the government itself evidently believed, from the opposite direction, when it sought en banc review of the panel's decision as to both requirements. See Gov't C.A. Pet. for Reh'rg 7-15. With regard to the substantial-justification requirement, like the prevailing-party requirement, the First Circuit's decision cannot be reconciled with *Al-Maleki*, in which the Tenth Circuit held, in a materially identical context, that the government's position was not substantially justified. See 558 F.3d at 1206-1210. Although the First Circuit attempted to distinguish the Tenth Circuit's holding on the substantial-justification requirement on the ground that "that court was not faced with the justifications offered to us," Pet. App. 28a n.21, a review of the briefs indicates that the government advanced similar arguments before both courts as to that requirement. Compare, *e.g.*, Gov't C.A. Br. 20-28 and Gov't Supp. C.A. Br. 13-19 with Gov't Br. at 29-36, *Al-Maleki*, *supra* (No. 07-4260).

Nor is the analysis as to the substantial-justification requirement particularly complicated. The government's position was not substantially justified for the simple reason that the government utterly flouted its unambiguous regulatory obligations to conduct a background investigation first and then process petitioner's naturalization application within 120 days of his examination—obligations whose existence the government conspicuously does not dispute. See, *e.g.*, *Role Models America, Inc.* v. *Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (explaining that an agency's conduct "lack[s] sub-

stantial justification" where it is "wholly unsupported by the text of the applicable regulations").[3]

2. In the alternative, the government contends that this case is a poor vehicle for consideration of the substantial-justification requirement "because of the minimal factual record that has been compiled with respect to it." Br. in Opp. 22.

To begin with, consideration of any factual issues is unnecessary where, as here, the government's position is squarely inconsistent with applicable statutes or regulations. See *Pierce* v. *Underwood*, 487 U.S. 552, 560 (1988) (explaining that the question of whether the government's position was substantially justified may involve a "purely legal issue"); cf. Pet. App. 18a (holding "as a matter of law" that the government's position was substantially justified). But in any event, contrary to the government's suggestion, this case does not implicate any "disagreements about what happened or why," Br. in Opp. 22, because USCIS's policy of conducting background investigations only after examinations, and its accompanying policy of expediting background investigations for those applicants who sued the agency to challenge the resulting processing delays, are matters of public record. See, *e.g.*, C.A. App. 45. Unsurprisingly, then, the government does not specify what additional

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[3] The government suggests (Br. 18-19) that its position could nevertheless be substantially justified because petitioner suffered no harm from the government's failure to comply with its regulatory obligations. There is no basis for such a harmless-error inquiry, however, either in EAJA itself or in the underlying cause of action in Section 1447(b). And even if there were, petitioner did suffer harm, because he had to prosecute a federal lawsuit (and thereby incur legal expenses) in order to force the government to act on his naturalization application in a less untimely manner.

factual information it would like to have in the record—nor has it ever sought to introduce any additional information at earlier stages of this litigation. The government therefore can hardly suggest that its failure to do so constitutes a vehicle problem that precludes this Court's review.

C. The Question Presented Is An Important And Recurring One That Merits The Court's Review

As noted at the outset, the government contends that this case no longer warrants further review on the ground that "the issues in this case[] are of little continuing importance." Br. in Opp. 22. That contention, too, lacks merit.

1. As a preliminary matter, there has been no material change in the relevant factual circumstances since October 2008, when the government sought en banc review in the First Circuit on the ground that the case presented an issue of "exceptional importance." Gov't C.A. Pet. for Reh'rg 9. As the government recognizes, USCIS had by that date abandoned its policy of conducting examinations of naturalization applicants before their background investigations were completed. See Br. in Opp. 5. The government had also announced its plan to eliminate the so-called "backlog" of delayed background investigations for naturalization applicants—and had in fact mostly eliminated that "backlog" (and indicated its intention to eliminate the remainder in a matter of months). See *id.* at 5-6. The government therefore cannot tenably argue that any subsequent elimination of the remainder of the "backlog" is sufficient to reduce the question presented in this case from one of "great legal and practical importance," as it contended as recently as twelve months ago, to one of "little continuing importance," as it now suggests.

2. In any event, the question presented is likely to recur in the specific context in which this case arises: *i.e.*, where an applicant for naturalization brings suit under Section 1447(b) because of delays in the completion of his background investigation. As the government acknowledges, as of April 2008, the Federal Bureau of Investigation (FBI) had failed to complete background investigations for almost *30,000* naturalization applicants whose examinations had already been conducted (but whose background investigations had been pending for *more than two years*). See Br. in Opp. 5. It is therefore probable that numerous cases remain in which the specific cause for the delay was the failure to complete a timely background investigation as a result of the "backlog." And such cases may continue to arise even now that the "backlog" has purportedly been eliminated, because USCIS has cautioned that, while the FBI is now completing its portion of background investigations within 90 days, the information provided by the FBI "may require further evaluation" (thus potentially "result[ing] in additional delays in processing"). USCIS, *USCIS, FBI Eliminate National Name Check Backlog* (June 22, 2009) <tinyurl.com/uscisbacklog>.[4]

3. In addition, the question presented in this case—*i.e.*, whether an applicant for naturalization who brings suit under Section 1447(b) and obtains a court-ordered remand is entitled to fees under EAJA—will inevitably

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[4] Indeed, Section 1447(b) actions of this type have continued to be filed since USCIS's announcement that it had eliminated the "backlog," see Pet. 29 n.9 (citing cases), and still more have been filed even since the petition for certiorari in this case, see, *e.g.*, *Lucaj* v. *USCIS*, No. 09-14716 (E.D. Mich. filed Dec. 3, 2009); *Hussein* v. *Napolitano*, No. 09-1268 (E.D. Va. filed Nov. 12, 2009); *Al-Yaseri* v. *Heinauer*, No. 09-3226 (D. Neb. filed Nov. 5, 2009).

arise in other factual contexts, in which the cause of the delay is something other than the failure to complete a timely background investigation. The government wisely does not dispute that proposition, in light of its chronic and seemingly intractable inability to process naturalization applications in a timely manner. Indeed, Section 1447(b) was originally enacted in 1990—long before USCIS's recent problems with completing background investigations—out of concern that USCIS's predecessor agency had a tendency to put complex applications on the "backburner." See H.R. Rep. No. 187, 101st Cong., 1st Sess. 11-12 (1989). A decision by the Court in this case, moreover, would shed light on the broader issue of what is required to render a party a "prevailing party"—an issue that arises under a variety of different fee-shifting statutes in addition to EAJA. See Pet. 29-30.

In considering the bigger picture, however, one should not lose sight of the fact that the context in which this case arises is important in its own right. By requiring an applicant for naturalization to bring suit simply to force the government to process his application in a less untimely manner, the government has engaged in conduct that is not only unjustified, but affirmatively offensive. The least the government can do is to bear the modest cost of litigation that it effectively invited as a prerequisite of more expeditiously obtaining the priceless benefits of citizenship. The Court should grant review in order to eliminate the clear circuit conflict on the availability of EAJA fees and correct the manifestly unjust outcome of the court of appeals' decision.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully seeks reconsideration of this Court's decision to deny certiorari in this case in light of its decision to grant certiorari on a substantially similar question in *Hardt* v. *Reliance Standard Life Insurance Co.*, No. 09-448 (cert. granted Jan. 15, 2010). Consistent with the Court's past practice, petitioner requests that the Court hold this petition for rehearing pending its decision in *Hardt*, then dispose of the petition accordingly.

1. This case presents the question whether an applicant for naturalization who obtains a court-ordered remand in an action under 8 U.S.C. 1447(b) so that his application for naturalization can be granted is a "prevailing party" who is entitled to attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A).

The Court considered the petition for certiorari in this case at its January 15 Conference and issued an order denying certiorari on January 19. At the same Conference, however, the Court considered and granted the petition for certiorari in *Hardt*. The Court granted review in that case on two questions presented; first, whether a plaintiff in an action under the Employee Retirement Income Security Act of 1974 (ERISA) must be a "prevailing party" in order to obtain attorney's fees under ERISA's fee-shifting provision, 29 U.S.C. 1132(g)(1), and second, whether an ERISA plaintiff who obtains a court-ordered remand, and thereafter receives benefits, is entitled to attorney's fees under that provision. See Pet. at i-ii, *Hardt*, *supra*.

2. The Court's decision in *Hardt* will likely affect the analysis in this case. If the Court were to hold in *Hardt* that a plaintiff must be a "prevailing party" in order to obtain attorney's fees under ERISA, the mode of analysis would be identical in both cases, because the relevant inquiry in each instance would be whether a court-ordered remand works the "judicially sanctioned change in the legal relationship of the parties" necessary to confer "prevailing party" status. *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Indeed, in rejecting the plaintiff's motion for attorney's fees, the court of appeals in *Hardt*, much like the court of appeals in this case, ultimately held that the "remand order did not satisfy the requirements of *Buckhannon*" on the ground that the order "did not *require* [the plan administrator] to award benefits to [the plaintiff]." Pet. App. at 10a, *Hardt*, *supra*; cf. Pet. App. 15a, 18a (holding in this case that "[t]he order remanding to the agency is alone not enough to establish the needed imprimatur" on the

ground that "[t]he court did not order [the agency] to do anything").

The Court's resolution of the second question presented in *Hardt*, therefore, will likely have a direct bearing on the correct analysis in this case. Specifically, should the Court hold that the plaintiff in *Hardt* qualifies as a "prevailing party" by virtue of the court-ordered remand, it would be difficult not to reach the same conclusion concerning the petitioner in this case, because the Court has made clear that the phrase "prevailing party" is a "legal term of art" that should be construed consistently across different fee-shifting statutes. *Buckhannon*, 532 U.S. at 603 & n.4. Indeed, insofar as petitioner expressly *sought* a remand in his original complaint, he arguably has an even more compelling claim for "prevailing party" status than the plaintiff in *Hardt*. Compare C.A. App. 57 with Pet. App. at 10a-11a, *Hardt*, *supra*.

In addition, if the Court were to hold in *Hardt* that a plaintiff need not be a "prevailing party" in the first place in order to obtain attorney's fees under ERISA, the Court may at that point wish to revisit whether to grant certiorari in this case. As the Court's grant of certiorari on the second question presented in *Hardt* reflects, there is uncertainty in a variety of factual contexts as to whether (and, if so, under what circumstances) a court-ordered remand gives rise to "prevailing party" status for fee-shifting purposes. See Pet. 18-21. Regardless of the extent of the circuit conflict on the specific facts presented in this case, that broader uncertainty may justify further review.

3. It has been this Court's practice to hold a petition for rehearing on its docket during the pendency of a case raising a related issue. See, *e.g.*, *Day* v. *McDonough*, 547 U.S. 198 (2006), pet. for reh'g denied, 549 U.S. 1261

(2007); see generally Eugene Gressman et al., *Supreme Court Practice* 818-821 (9th ed. 2007). Accordingly, in light of the potential impact of *Hardt* on the appropriate disposition of this case, we respectfully submit that the most prudent course at this juncture is to hold this petition for rehearing pending the decision in *Hardt*. Should the Court do so, petitioner will file a supplemental brief immediately following the decision in *Hardt* with a recommended disposition of the petition for rehearing and the underlying petition for certiorari.

* * * * *

The petition for rehearing should be held pending the Court's decision in *Hardt* v. *Reliance Standard Life Insurance Co.*, No. 09-448, and then disposed of accordingly.

Respectfully submitted.

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CERTIFICATION OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in this Court's Rule 44.2.

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